Supreme Court, U.S.
FILED

961721 APR 25 1997

OFFICE OF THE CLERK

No. 96-

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,
a federally recognized tribe,

Petitioner,

vs.

C&L ENTERPRISES, INC.,
an Oklahoma corporation,

Respondent.

**Petition For A Writ Of Certiorari
To The Supreme Court
For The State Of Oklahoma**

PETITION FOR A WRIT OF CERTIORARI

MICHAEL MINNIS
Counsel of Record
DAVID MCCULLOUGH
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N Broadway Ave Ste 3160
Oklahoma City OK 73102-8805
(405) 235-7686 FAX (405) 232-5460

Attorneys for Petitioner
Citizen Potawatomi Nation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether state courts violate the Indian Commerce and Supremacy clauses to the United States Constitution by rejecting federal decisional law that Indian tribes have immunity to suit in state courts even for actions on contracts executed outside of Indian country?

2. Whether a state court violates the Indian Commerce and Supremacy clauses to the United States Constitution by ignoring Supreme Court decisions to enter money judgments against an Indian tribe for an unperformed contract to build a roof on a building located on land owned by the tribe where the Indian tribe has not waived sovereign immunity and the contract is not endorsed by the Secretary of the Interior?

PARTIES TO THE PROCEEDINGS

The Petitioner (Defendant/Appellant below) is the Citizen Potawatomi Nation, a federally recognized Indian tribe, formerly known as the Citizen Band Potawatomi Indian Tribe of Oklahoma until the Tribal constitution was amended in 1996. Petitioner was identified in the state court case caption as "Citizen Band Potawatomi Tribe of Oklahoma a/k/a Citizen Band Potawatomi Indians of Oklahoma."

The Respondent (Plaintiff/Appellee below) is C&L Enterprises, Inc., an Oklahoma Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINION BELOW 1

JURISDICTIONAL STATEMENT 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

REASONS FOR ALLOWING THE WRIT 8

SUMMARY OF THE REASONS 8

ARGUMENT 9

Proposition 1: Oklahoma has decided an important federal question that conflicts with decisions of the Tenth Circuit Court of Appeals 14

Proposition 2: Oklahoma has decided an important federal question that conflicts with decisions of the Supreme Court 18

a. Tribal immunity is consistent with federal immunity which applies even to activities outside federal lands 18

b. States have jurisdiction over Indian tribes only when the tribe has made a clear and unequivocal waiver of immunity 19

c. Contracts relative to Indian lands are null and void absent endorsement by the Secretary of the Interior 20

CONCLUSION 22

APPENDIX ..... App. 1

TABLE OF CONTENTS – Continued

Page

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. 86,568 (Okla. Ct. of Civ. App. Div. No. 2 filed Nov. 5, 1996) (memorandum opinion)...App. 1

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. 86,568 (Okla. Sup. Ct. filed Mar. 3, 1997) (mandate) .....App. 5

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. 86,568 (Okla. Sup. Ct. filed Jan. 27, 1997) (order and judgment on supersedeas bond) ..App. 6

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Mar. 21, 1996) (court order taxing attorney fees and costs) .....App. 8

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Oct. 27, 1995) (journal entry of judgment confirming arbitration award) .....App. 11

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Oct. 13, 1995) (court order denying motion to reconsider) .....App. 14

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Sept. 22, 1995) (court order denying motion to dismiss).....App. 15

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Aug. 25, 1995) (motion to dismiss) .....App. 16

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. CJ-95-5204-64 (D. Ct. Okla. Co. filed Aug. 7, 1995) (petition to confirm arbitration award).....App. 18

TABLE OF AUTHORITIES

Page

CASES:

Aircraft Equipment Co. v. Kiowa Tribe of Okla., 921 P.2d 359 (Okla. 1996) 11, 12, 14, 15

Alonzo v. U.S., 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958) 21

C&L Enterprises, Inc., v. Citizen Band Potawatomi Indian Tribe of Okla., Case No. CJ-95-5204-64 (Okla. Co. Dist. Ct. Aug. 7, 1995) 5

C&L Enterprises, Inc. v. Citizen Band Potawatomi, No. 86,568 (Okla. Sup. Ct. filed Nov. 27, 1995) ...5, 6

Citizen Band Potawatomi Indian Tribe of Okla. v. Freeman, No. 86, 401 (Okla. Sup. Ct. Oct. 20, 1995) 6, 12

DeFeo v. Ski Apache Resort, 120 N.M. 640, 904 P.2d 1065 (N.M. App. 1995), *cert. denied*, 120 N.M. 533, 903 P.2d 844 (N.M. 1995) 16

Elliott v. Capital International Bank & Trust, Ltd., 870 F.Supp. 733 (E.D. Tex. 1994), *aff'd sub nom., Elliott v. Paisley*, 102 F.3d 549 (5th Cir. 1996) 16

Federico v. Capital Gaming International, Inc., 888 F.Supp. 354 (D.R.I. 1995) 16, 17

First National Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee, 913 P.2d 299 (Okla. 1996) 11, 15

Green v. Menominee Tribe of Indians in Wisconsin, 233 U.S. 558 (1914) 20

In re Greene, 980 F.2d 590 (9th Cir. 1992), *cert. denied sub nom., Richardson v. Mount Adams Furniture*, 510 U.S. 1039 (1994) 11, 12, 16, 17

TABLE OF AUTHORITIES – Continued

Page

Hoover v. Kiowa Tribe of Okla., 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996) 7, 12, 13, 14

Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc., 117 S.Ct. 1241, 65 USLW 3629 (1997) 7, 13

Lewis v. Sac and Fox Tribe of Okla. Housing Authority, 896 P.2d 503 (Okla., 1994), *cert. denied*, 116 S.Ct. 476 (1995) 13

Maryland Cas. Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966) 13, 15, 18

McLin v. Trimble, 795 P.2d 1035 (Okla. 1990) 11

Narragansett Indian Tribe v. Ribo, Inc., 686 F.Supp. 48 (D.R.I. 1988) 21

North Sea Products, Ltd. v. Clipper Seafoods Company, 92 Wash.2d 236, 595 P.2d 938 (1979) 16

Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505 (1991) 17, 20

Padilla v. Pueblo of Acoma, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied*, 490 U.S. 1029 (1989) 16

Phillips v. Williams, 608 P.2d 1131 (Okla. 1980) 11

Puyallup Tribe, Inc. v. Department of Game of State of Wash., 433 U.S. 165 (1977) 20

Romanella v. Hayward, 933 F.Supp. 163 (D.Conn. 1996) 16

Sac and Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995), *cert. denied sub nom., Willingham v. Sac and Fox Nation*, 116 S.Ct. 57 (1995) 15, 16

TABLE OF AUTHORITIES – Continued

Page

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 20

Seminole Tribe of Florida v. Houghtaling, 589 So.2d 1030 (Fla.App. 2 Dist., 1991), *aff'd*, 611 So.2d 1235 (Fla. 1993) 16

Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996) 10

Seneca-Cayuga Tribe of Okla. v. State of Okla. ex rel. Thompson, 874 F.2d 709 (10th Cir. 1989) 13

State ex rel. May v. Seneca-Cayuga Tribe of Okla., 711 P.2d 77 (Okla. 1985) 13

Teague v. Lane, 489 U.S. 288 (U.S. 1989) 14

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877 (1986) 17

Tohono O'odham Nation v. Schwartz, 837 F.Supp. 1024 (D.Ariz. 1993) 11

United States v. United States Fidelity & Guar. Co., 309 U.S. 506 (1940) 19

United States v. Testan, 424 U.S. 392 (1976) 20

United States v. Mitchell, 445 U.S. 535 (1980) 18

United States v. King, 395 U.S. 1 (1969) 20

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 9

UNITED STATES CONSTITUTION:

CONST. art. I, § 8, cl. 3 ..... 1, 9

CONST. art. VI, cl. 2 ..... 2, 9

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES AND RULES:

25 U.S.C. § 81 ..... 2, 5, 6, 18, 20

25 U.S.C. § 177 4

28 U.S.C. § 1257 1

SUP. CT. R. 10.1(b) 8

SUP. CT. R. 10.1(c) 8

SUP. CT. R. 13.1 1

OTHER:

ARTICLES OF CONFEDERATION, art. IX, cl. 4; 1 Stat. 4 9

Joseph P. Story, *Commentaries on the Constitution*, ch. XVI, § 173 (New York; Harper & Brothers, 1859) 10

William V. Vetter, "Doing Business with Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction," 36 ARIZ. L. REV. 169 (1994) 17

OPINION BELOW

The Court of Civil Appeals for the State of Oklahoma (Division No. 2) filed a Memorandum Opinion affirming judgments against the Petitioner filed by the District Court for Oklahoma County. The court of appeals decision disposed of the Petitioner's appeal of those judgments other than by a published opinion. This disposition is noted at 67 Okla. Bar J. 3465 (Nov. 9, 1996). A copy of the Memorandum opinion is in the Appendix.

JURISDICTIONAL STATEMENT

The Oklahoma Court of Appeals decision was filed November 5, 1996. Petitioner's timely petition to the Oklahoma Supreme Court for review by *certiorari* was denied January 27, 1997. This petition is being filed within ninety (90) days after the entry of an order denying discretionary review. SUP. CT. R. 13.1. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. art. I, § 8, cl. 3.

The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. CONST. art. VI, cl. 2.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

25 U.S.C. § 81

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority

and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom is was so paid.

STATEMENT OF THE CASE

On August 25, 1993, C&L Enterprises, Inc., ("C&L"), Respondent, signed an "Abbreviated Form of Agreement

Between Owner and Contractor" (1987 edition)[1] to construct a foam roof on a building located on land[2] owned by the Citizen Potawatomi Nation ("Potawatomi") for $85,000. This document was also signed by three of the five members of the Potawatomi Business Committee. Under the agreement, construction on the foam roof was not to begin until a "notice to proceed" was issued by the project architect. A notice to proceed with construction was never issued.

On March 14, 1994, after learning that birds had eaten holes in a foam roof at another project, the architect determined that the roof should be rubberguard, not foam. On April 19, though lacking the ability to build a rubberguard roof, C&L offered to lower the foam roof price by $6,600, allegedly signed a contract with a subcontractor who would build the rubberguard roof, and submitted an offer based on having a subcontractor perform all the work, which bid was $21,616 higher than the lowest bidder. On April 25, the low bid was accepted. Subsequently the rubberguard roof was built for $56,784.

On January 24, 1995, though C&L never initiated any work, C&L submitted the foam roof agreement to an arbitrator. Upon receiving notice of the arbitration, the

---

[1] The contract form was copyrighted by the American Institute of Architects. A copy of this document was attached as Plaintiffs' Exhibit A to the petition. *See* App. 22.

[2] The building is located on land owned by the Potawatomi that has not yet been taken into trust by the United States. The land is "restricted Indian land." 25 U.S.C. § 177. As restricted Indian land, the consent of the United States is a prerequisite to alienation.

Potawatomi notified the arbitrator in writing that the Potawatomi were asserting sovereign immunity, had numerous substantive defenses to the arbitration claim including that the agreement was not endorsed as required by federal law,[3] but had no intention of waiving immunity by participating in the arbitration proceedings.

On June 30, 1995, the arbitrator entered a default award of $25,400 plus attorney's fees and costs. The arbitration award does not mention tribal sovereign immunity nor explain how the amount of the award was computed.[4]

On August 7, C&L filed suit[5] in the District Court for Oklahoma County to confirm the default arbitration award. The Potawatomi specially appeared and moved to

---

[3] 25 U.S.C. § 81 requires any agreement with an Indian tribe for the payment of money "in consideration of services for said Indians relative to their lands" to have the approval of the Secretary of the Interior endorsed thereon. Absent such endorsements, an agreement is "null and void." The C&L foam roof agreement was not so endorsed.

[4] A copy of the arbitrator's award is Exhibit B to the Petition. *See* App. 51. C&L has subsequently suggested that the damages awarded by the arbitrator were based on the difference between the C&L agreement price ($85,000) and the subcontractor's price. *See, e.g.*, Answer Brief of Appellee at 2. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, No. 86,568 (Okla. Sup. Ct. filed July 3, 1996).

[5] *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, Case No. CJ-95-5204-64 (Okla. Co. Dist. Ct. filed Aug. 7, 1995) (petition for confirmation of arbitration award). App. 18.

dismiss based on sovereign suit immunity. App. 16.[6] Without a hearing, the District Court denied the Potawatomi motion to dismiss [App. 15] and a subsequent motion for reconsideration. App. 14. These orders do not articulate any putative basis for the District Court's exercise of jurisdiction over the Potawatomi but simply state: "Overruled" and "Denied." The Potawatomi promptly sought a writ of prohibition from the Oklahoma Supreme Court.[7]

On October 27, a week after the Potawatomi filed for a writ of prohibition, the District Court entered a default judgment against the Potawatomi for $28,414.67. App. 11. Subsequently, the Oklahoma Supreme Court refused to grant a writ of prohibition[8] and the Potawatomi timely appealed to the Oklahoma Supreme Court.[9]

On March 21, 1996, C&L obtained a second default judgment from the District Court for $10,545 in attorney's fees and costs. App. 8. This judgment was also appealed. Most of the work allegedly supporting C&L's fees

---

[6] In the supporting brief, the Potawatomi raised the 25 U.S.C. § 81 deficiency. *See* Brief in Support of Motion to Dismiss, at 5, n. 17 (filed Aug. 25, 1995).

[7] *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Freeman*, No. 86,401 (Okla. Sup. Ct. filed Oct. 20, 1995) (petition for writ of prohibition).

[8] *See id.* at Order, Dec. 13, 1995.

[9] The Potawatomi asserted, *inter alia*, that the District Court erred in exercising jurisdiction and in enforcing a contract not endorsed as required by 25 U.S.C. § 81. *See, e.g.*, Brief of Appellant, at 18. *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, No. 86,568 (Okla. Sup. Ct. filed May 24, 1996).

was performed post judgment in other litigation.[10] Nevertheless, the trial court entered an award for all of the attorney's fees claimed by C&L.

On November 5, the Court of Appeals affirmed the District Court judgments holding that "*Hoover*[11] directly controls on the issue of tribal immunity"[12] and that the Potawatomi waived any other defects in C&L's cause of action or C&L's claim for attorney's fees by allowing judgments to be entered by default. App. 4.

The Potawatomi timely petitioned the Oklahoma Supreme Court for review by *certiorari*.[13] This petition was denied January 27, 1997. App. 6. Mandate was issued

---

[10] Of the fees awarded, 72% ($7,620) were for services allegedly performed post judgment. The attorney fee judgment is patently untenable coming in a case where no contested hearings were held and judgment was entered by default. Attorney fees were 35% of the judgments entered by the District Court.

[11] *v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996).

[12] App. 3. "The *Hoover* court held that a 'contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian country.' 909 P.2d at 62."

[13] The Potawatomi argued, *inter alia*, that *Hoover* did not apply because the C&L agreement was never performed and, in any event, called for performance on tribally owned land. Thus, in denying *certiorari*, the Oklahoma Supreme Court implied that *Hoover* will be so broadly construed that every tribal contract is subject to adjudication in state court, tribal sovereignty notwithstanding.

March 3, but enforcement has been stayed pending resolution of this petition. App. 5.

REASONS FOR ALLOWING THE WRIT

1. The writ should be allowed because a state court of last resort has decided an important federal question in a way that conflicts with the decisions of a United States Court of Appeals. SUP. CT. R. 10(b).

2. The writ should also be allowed because a state court has decided important questions of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c).

SUMMARY OF THE REASONS

1. The Oklahoma Supreme Court has held that Indian tribes are not immune from suit in Oklahoma courts based on contracts "executed outside of Indian country." This holding directly conflicts with a decision of the Tenth Circuit Court of Appeals.

2. The Oklahoma Supreme Court decision also conflicts with decisions by this Court that federal law controls Indian commerce, that tribal immunity is synonymous with the immunity of the federal government, that tribes are immune from suit in state court absent an unequivocable waiver of that immunity, and that contracts with Indian tribes affecting their lands not

endorsed by the Secretary of the Interior are null and void.

ARGUMENT

Exclusive federal control of Indian commerce has been the "supreme Law of the Land"[14] since 1789 when the Constitution replaced the Articles of Confederation. *See* U.S. CONST. art. I, § 8, cl. 3. "**The whole intercourse** between the United States and this [Cherokee] Nation is, by our Constitution, vested in the government of the United States. * * * [the acts of the State of Georgia] interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, are committed **exclusively** to the government of the Union." *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515, 562 (1832) (emphasis added). In his treatise on the Constitution, Justice Story explained that the Indian Commerce Clause was specifically enacted to eliminate the ambiguity and conflict created by a provision in the Articles of Confederation allowing states to regulate trade with Indians who were "members" of a state.[15] "The

---

[14] U.S. CONST. art. VI, cl. 2. ("Judges in every State shall be bound thereby").

[15] "The United States in Congress assembled shall also have the sole and exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." ARTICLES OF CONFEDERATION, art. IX, cl. 4; 1 Stat. 4, 7.

Constitution * * * has given to Congress, as the only safe and proper depositary, the exclusive power, which belonged to the Crown in the ante-revolutionary time; a power indispensable to peace of the states, and to the just preservation of the rights and territory of the Indians." Joseph P. Story, *Commentaries on the Constitution*, ch. XVI, § 173 (New York; Harper & Brothers, 1859). The Supreme Court has recently reiterated this consistent doctrine: "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the states still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114, 1126, (1996).

The Potawatomi are petitioning this Court for *certiorari* because the Supreme Court of the State of Oklahoma is regulating Indian commerce in contravention of the Constitution. In Oklahoma, Indian commerce is now being regulated by the state judiciary, not by Congress. The Oklahoma judiciary is claiming jurisdiction over the Potawatomi and other Indian tribes in a manner directly in conflict with applicable federal law. In affirming the judgments below, the Oklahoma Supreme Court did not make an isolated decision based on special equity circumstances. On the contrary, the decision was consistent with the Oklahoma Supreme Court's recent pattern of exercising authority over Indian commerce in direct defiance of federal law.

Although "courts have consistently determined that the interpretation of Indian law is a matter of

federal law,"[16] Oklahoma ignores "nearly two hundred years of recognizing sovereign immunity's extra-territorial reach"[17] under federal law by labeling a tribal jurisdictional challenge a "state law question."[18] Oklahoma then answers the "state law question" relying

---

[16] *Tohono O'odham Nation v. Schwartz*, 837 F.Supp. 1024, 1029 (D. Ariz. 1993) (contractor's suit for breach of contract in state court enjoined).

[17] *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994).

[18] "This Court has previously held that a federal court's pronouncement on a state law question lacks the force of authority in that it cannot bind this Court." *Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361 (Okla. 1996). *Cf. First National Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299, 301 (Okla. 1996) ("Oklahoma contract and conveyancing law, rather than tribal [sic] law, governed settlement of the dispute."). Had the question been defined as "federal law," the result would probably have been different. *See Phillips v. Williams*, 608 P.2d 1131, 1135 (Okla. 1980) ("While the pronouncement on a federal-law question by an inferior federal court is not necessarily binding on us, it is indeed highly persuasive."); *McLin v. Trimble*, 795 P.2d 1035, 1038 (Okla. 1990) (" * * * the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.' * * * "). *See also id.* at 1047 (Opala, V.C.J., dissenting): "[W]e follow, as a matter of comity, the Tenth Circuit opinions on substantive federal law and that court's constitutional jurisprudence applicable to the states. * * * The voluntary deference we pay to our circuit's pronouncements prevents federal law from being dichotomized within the State of Oklahoma into different bodies of legal norms – that applied in Oklahoma courts and that which governs federal courts sitting within this state."

on inapt analogies to Supreme Court opinions[19] and on unsoliticited paternalism.[20]

The effect of this judicial usurpation has been a proliferation of litigation in federal courts initiated by Indian tribes seeking vindication of Constitutionally protected rights.[21] Despite tribal success in federal

---

[19] The analogies are to cases construing states' taxing powers outside of Indian country [*Hoover* at 61] and to cases holding that the Constitution does not prohibit "a state's exercise of jurisdiction over sovereign sister states." *Id.* at 62. The Ninth Circuit explains why these cases are not analogous to tribal suit immunity. "[A]pplication of the pre-emption analysis is limited to situations where the state itself is seeking to tax or regulate conduct on the reservation. If there is no attempted state action, there is nothing to be pre-empted. * * * Tribal immunity from suit arises from the Government's recognition that Indian tribes possess the attributes of a common law sovereign, and neither pre-emption nor dependent status analyses have been stated by the Supreme Court to affect that status." *In re Greene*, 980 F.2d at 596. "[T]he [New Mexico court in *Padilla*] should have looked at the scope of tribal immunity under federal law, rather than the extent of comity afforded under state law." *Id.* at 595.

[20] If Oklahoma Courts do not exercise jurisdiction over suits against tribes, "tribes would have difficulty finding anyone willing to risk his funds in unenforceable obligations. Such a rule would chill tribal commercial and entrepreneurial business." *Aircraft Equipment Co.*, 921 P.2d at 362.

[21] *See, e.g., Citizen Band Potawatomi v. Freeman*, No. CIV-95-1967-T (W.D. Okla. Aug. 6, 1996) (order dismissing complaint on abstention grounds), *appeal docketed*, No. 96-6279 (10th Cir. Aug. 21, 1996). *See also C&L Enterprises, Inc. v. Citizen Band Potawatomi*, CIV-96-0144-T (W.D. Okla. Jan. 26, 1996) (removed garnishment action remanded); *C&L Enterprises, Inc. v. Citizen Band Potawatomi*, CIV-96-0879-C (W.D. Okla. June 4, 1996) (removed asset hearing remanded).

litigation,[22] the Oklahoma Supreme Court has not tempered[23] its campaign to create an Indian commerce jurisprudence completely at odds with federal law. As a result of Oklahoma's decisions, Indian tribes in Oklahoma must continually bring expensive litigation in federal courts, Indian commerce is disrupted, and the very existence of tribes and their assets[24] are threatened. The Oklahoma judiciary has clearly stated that its judicial usurpation can only be stopped by this Court: "We follow the jurisprudence of *Hoover* and *Lewis* [*v. Sac and Fox Tribe of Okla.*, 896 P.2d 503 (Okla. 1994), *cert. denied*, 116 S.Ct. 476 (1995)] because in both cases certiorari was denied by the Supreme Court of the United States.[25] It is only

---

[22] *See, e.g., Seneca-Cayuga Tribe of Oklahoma v. State of Okla. ex rel. Thompson*, 874 F.2d 709 (10th Cir. 1989) (enforcement of state court action against tribe enjoined, affirmed). *Compare State ex rel. May v. Seneca-Cayuga Tribe of Okla.*, 711 P.2d 77 (Okla. 1985) (dismissal of state district court action against tribe, reversed).

[23] Compare New Mexico. *See* note 28. Even though New Mexico subsequently modified its case law, Oklahoma continues to rely on the earlier New Mexico decision. *See, e.g.*, App. 3.

[24] After judgment was entered, C&L brought a post judgment garnishment action against a bank holding Potawatomi monies including federal funds being managed by the Potawatomi. The Oklahoma District Court rejected all claims that these assets were exempt from garnishment. Thus, Oklahoma is not only ignoring federal law on tribal suit immunity, it is also ignoring federal law on tribal asset immunity. *Cf. Maryland Cas. Co., v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521 (5th Cir. 1966) ("tribe was immune from garnishment proceeding.").

[25] A third petition for *certiorari* seeking review of *Hoover*'s progeny is pending in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, No. 96-1037 (U.S. Sup. Ct. filed Dec. 23, 1996).

when we are without the guidance of that Court we may choose to follow circuit court case law. * * * given the fact that the Supreme Court of the United States has chosen not to grant certiorari to review either the *Hoover* or *Lewis* opinions, we decline to follow the reasoning of the 10th Circuit." *Aircraft Equipment Co.*, at 361-62.[26]

Unfortunately, a sad part of this nation's history is that states, when not restrained by the federal government, have sought (sometimes successfully) to confiscate Indian lands and other assets for the benefit of non-Indians. The Oklahoma Supreme Court seems determined to continue this regrettable tradition.

Proposition 1. Oklahoma has decided an important federal question that conflicts with a decision of the Tenth Circuit Court of Appeals.

The Court of Appeals affirmed the judgment for C&L on the basis of *Hoover* which held that Indian tribes are not immune from suit in Oklahoma District Courts for contracts "executed outside of Indian country." *Id.* at 60. This decision directly conflicts with a decision of the Tenth Circuit that tribal commercial activity outside of Indian country does not affect tribal sovereignty.

See also 1996 WL 757410, 65 USLW 3468; 117 S.Ct. 1241 (Mem), 65 USLW 3629.

[26] The dissent notes that "the Supreme Court has held 'denial of writ of certiorari imports no expression of opinion upon the merits of the case' *Teague v. Lane*, 489 U.S. 288, 296 * * * (1989)." *Aircraft Equipment Co.*, at 363 (Summers, J., dissenting).

> [W]e do not believe that the location of the commercial activity is determinative. * * * we * * * conclude that the extra-territorial nature of these transactions does not strip the Nation [an Indian tribe] of its right to assert sovereign immunity. * * * Without an explicit waiver, the Nation is immune from suit in state court – even if the suit results from commercial activity occurring off the Nation's reservation.

Sac & Fox Nation v. Hanson, 47 F.3d 1061, 1064-65 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 57 (1995). The Oklahoma Supreme Court has acknowledged this conflict between its decisions and those of federal circuit courts. "[Holdings by this Court that tribes waive sovereign immunity when engaging in commercial activity outside of Indian country] directly contradicts the United States Court of Appeals for the Tenth Circuit's recent decision in *Sac & Fox Nation v. Hanson*." *First National Bank in Altus*, 913 P.2d at 301 (Kauger, V.C.J. dissenting). *See also Aircraft Equipment Co.*, 921 P.2d, at 362 (Summers J., dissenting) ("I dissent because the majority opinion contravenes the mainstream of contemporary sovereign immunity jurisprudence. It is certainly contrary to *Sac & Fox Nation v. Hanson*").[27]

Sac & Fox Nation v. Hanson is consistent with virtually all courts[28] that have examined this issue. *See, e.g., Maryland*

---

[27] The Chief Judge of the Tenth Circuit has also remarked on this conflict: "two cases [decided by the Oklahoma Supreme Court] directly conflict with a Tenth Circuit case which established that a tribe is immune from being sued even if it arises from commercial activity outside of Indian country." *See* Kelly Kurt, *Judge Reviews Year in Indian Law*, THE DAILY OKLAHOMAN, June 5, 1996, at 13, *available in* 1996 WL 5315306.

[28] This fact has been noted by a dissenting Oklahoma justice. *See Aircraft Equipment Co.*, 921 P.2d at 362-63. (Summers,

Cas. Co., 361 F.2d at 521; *In re Greene*, 980 F.2d at 594 ("Since only Congress can limit the scope of tribal immunity, and it has not done so, the tribes retain the immunity sovereigns enjoyed at common law, including its extra-territorial component."); *Federico v. Capitol Gaming International, Inc.*, 888 F.Supp. 354 (D.R.I. 1995); *Elliott v. Capital International Bank & Trust, Ltd.*, 870 F.Supp. 733, 735 (E.D. Tex. 1994); *Romanella v. Hayward*, 933 F.Supp. 163, 167 (D.Conn. 1996) ("tribe's immunity from suit extends to commercial activities occurring off the reservation"); *Seminole Tribe of Florida v. Houghtaling*, 589 So.2d 1030, 1032 (Fla. App. 1991) (tribe "immune from suit despite its involvement in a commercial enterprise"), *aff'd*, 611 So.2d 1235 (Fla. 1993); *North Sea Products Ltd. v. Clipper Seafoods Company*, 92 Wash.2d 236, 595 P.2d 938 (1979).

The Ninth Circuit has held that tribal immunity barred an adversary action by a bankruptcy trustee to recover a preference received by an enterprise wholly owned and managed by the Yakima Indian Nation. The Ninth Circuit acknowledged the problems created by tribal commercial activities outside the reservation. However, after reviewing state and Supreme Court decisions,

---

J., dissenting). New Mexico was an exception, but, after *Sac & Fox v. Hanson* was decided, modified its holding. *See Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (New Mexico has jurisdiction over "off reservation" business conduct). *Compare De Feo v. Ski Apache Resort*, 904 P.2d 1065, 1068 (N.M. App. 1995) (citing *Sac & Fox Nation v. Hanson*, "reject plaintiff's contention that tribal sovereign immunity does not exist when the tribe engages in commercial activity"), *cert. denied*, 903 P.2d 844 (1995).

the Ninth Circuit concluded that the Supreme Court's concern for promoting tribal economic opportunities required the conclusion that tribal sovereignty "does not stop at the reservation's boundaries."[29]

> Subjecting a sovereign entity to suit without its consent necessarily interferes with the sovereign's ability to manage its own affairs and maintain control over its public funds, territories, and peoples. As the Supreme Court has observed, a tribe's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890, 106 S.Ct. 2305, 2313, 90 L.Ed.2d 881 (1986).

Federico, 888 F.Supp. at 356.

> It is in such enterprises and transactions that the Indian tribes and the Indians need protection * * * to construe the immunity to suit as not applying to suits on liabilities arising out of private transactions would defeat the very purpose of Congress in not relaxing the immunity,

---

[29] *In re Greene*, 980 F.2d at 598. *See also* William V. Vetter, "Doing Business with Indians and the Three 'S'es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction," 36 ARIZ. L. REV. 169 (1994). "The Ninth Circuit's opinion, and Judge Rymer's concurring opinion, note the distinction between the sovereign immunity rules applied to tribes and those applied to state and foreign governments. Both opinions indicate that the rules applied to tribes are similar to the older, more protective rules that used to apply to other governments. Similar conclusions were reached by Justice Stevens in his concurring opinion in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514-516 (1991)." *Id.* at 173 (citing 980 F.2d 590 at 598).

> namely, the protection of the interests and property of the tribes and the individual Indian.

Maryland Cas. Co., 361 F.2d at 521-22.

Proposition 2. Oklahoma has decided an important federal question that conflicts with decisions of the Supreme Court.

The decision by the Oklahoma Supreme Court to affirm nearly $40,000 in default judgments against the Potawatomi conflicts with applicable decisions by this Court construing the Indian commerce clause, tribal immunity, and 25 U.S.C. § 81.

a) *Tribal immunity is consistent with federal immunity which applies even to activities outside federal lands.*

Tribal immunity is construed *in pari materia* with federal immunity. States do not have jurisdiction over the federal government when the federal government engages in business activities off of federal lands.[30] A territorial limitation on the concept of governmental immunity would emasculate the doctrine.

> Indian Nations are exempt from suit without congressional authorization. It is as though the immunity which was theirs as sovereigns

---

[30] *Cf. United States v. Mitchell*, 445 U. S. 535, 538 (1980). "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain suit' * * * in the absence of clear Congressional consent, then, 'there is **no jurisdiction** in the Court of Claims more than **in any other court** to entertain suits against the United States.'." (emphasis added).

> passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 512-513 (1940).

Nothing in this Court's decisions on suit immunity implies a territorial limitation. In fact, the opposite can be inferred.

> The sovereignty possessing immunity should not be compelled to defend against cross-actions away from its own territory or in courts, not of its own choice, merely because its debtor was unavailable except outside the jurisdiction of the sovereign's consent. This reasoning is particularly applicable to Indian nations with their unusual governmental organizations and peculiar problems.

Id. at 513.

b) *States have jurisdiction over Indian tribes **only** when the tribe has made a clear and unequivocal waiver of immunity.*

In finding jurisdiction over Indian tribes for commerce outside of Indian country, Oklahoma is essentially inferring a waiver of tribal immunity that is contrary to consistent decisions by the United States Supreme Court holding that tribal immunity from suit cannot be inferred but must be unequivocally expressed. An agreement which – if performed – would call for the construction of a roof on tribal property cannot possibly meet this standard of an "unequivocally expressed" waiver of sovereign immunity. *Puyallup Tribe, Inc. v. Department of Game*

of State of Wash., 433 U.S. 165, 172 (1977) ("absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978) (absent an unequivocal waiver, tribes are immune from suit in state court); *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 498 U.S. at 509-10 (absent a waiver of immunity, Oklahoma has no jurisdiction over Potawatomi).

A tribe's waiver of suit immunity "cannot be implied but must be unequivocally expressed." *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 953-54, 47 L.Ed.2d 114 (1976) (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed.2d 52 (1969)).

c) *Contracts relative to Indian lands are null and void absent endorsement by the Secretary of the Interior.*

25 U.S.C. § 81 makes any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The C&L agreement was to construct a roof on a building located on land owned by the Potawatomi. C&L performed no construction nor provided any services to the Potawatomi. However, had the contract been performed, C&L's services would clearly have been "relative to" Indian lands.

In *Green v. Menominee Tribe of Indians in Wisconsin*, 233 U.S. 558 (1914), this Court held that a contract with an Indian tribe not endorsed with the approval of the Secretary of the Interior was null and void. The effect of the Oklahoma decision affirming judgments against the Potawatomi is to give validity to an agreement null and

void under federal law. Neither the arbitrator nor the Oklahoma courts attempted to justify or explain their enforcement of the C&L agreement despite the lack of Secretarial endorsement. However, C&L has argued that Secretarial approval was not necessary because the land where the contract would have been performed is not *trust* land, but merely *restricted* Indian land. This distinction is contrary to federal jurisprudence.

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the Tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus the statute uses the term "their [the Indians'] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-Intercourse Act, 25 U.S.C. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonso v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Narragansett Indian Tribe v. Ribo, Inc., 686 F.Supp. 48, 51 (D.R.I. 1988).

CONCLUSION

This Court should grant the petition for *certiorari*, reverse the judgment for the Respondent, and remand this case with instructions to dismiss same for lack of jurisdiction.

Respectfully submitted,

MICHAEL MINNIS, OBA #6251*
DAVID MCCULLOUGH, OBA #10898
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N Broadway Ave Ste 3160
Oklahoma City OK 73102-8805
(405) 235-7686 FAX (405) 232-5460
Attorneys for Citizen Potawatomi Nation, Petitioner

* *Counsel of Record*

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 2

C&L ENTERPRISES, INC., an Oklahoma corporation, Appellee,	)	
vs.	)	No. 86,568
THE CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Appellant.	)	NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

Honorable Leamon Freeman, Trial Judge

John Mashburn
James Carlton, Jr.
Garvin, Agee, Carlton & Mashburn
Oklahoma City, Oklahoma — For Appellee

Michael Minnis
David McCullough
Michael Minnis & Associates, P.C.
Oklahoma City, Oklahoma — For Appellant

MEMORANDUM OPINION

(Filed Nov. 5, 1996)

STUBBLEFIELD, J.

This is an appeal by a federally recognized Native American tribe – The Citizen Band Potawatomi Indian Tribe of Oklahoma – from judgment of the district court confirming an arbitration award in a roofing contract dispute regarding non-trust, off-reservation property. Based on our review of the record on appeal and applicable law, we affirm.

In August 1993, the Citizen Band Potawatomi Indian Tribe (Tribe) entered into a contract with C&L Enterprises, Inc., (C&L) for C&L to construct a roof on a building being built by the Tribe. The record indicates that the construction was a commercial endeavor by the Tribe – the Tribe had purchased the land from First Oklahoma Bank some four months earlier and was constructing on the property what the contract designated "The Building for The First Oklahoma Bank."

After execution of the contract with C&L, the Tribe apparently decided to change the nature of the roof on the building from that described in the C&L contract. They gave the contract for the new roof to another company. C&L claimed breach of contract and, pursuant to terms of their contract, took the matter to arbitration. The arbitrator awarded C&L approximately twenty-nine percent of the contract price as damages and also awarded attorney fees. C&L filed this action to confirm the award.

The Tribe defended this action by moving to dismiss because of its immunity from suit. However, the lower

court denied the Tribe's motion to dismiss and, thereafter, the Tribe generally declined to appear in the lawsuit. The lower court entered judgment confirming the arbitration award and judgment for attorney fees. The Tribe appeals largely maintaining that the trial court erred in its refusal to find it immune from suit.

Dispositive of this issue is the case of *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995). The *Hoover* court dealt with the identical issue – whether "a contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." *Id.* at 60; *see also First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996). The *Hoover* court answered the question in the affirmative.

The *Hoover* court cited favorably the New Mexico case of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied* 490 U.S. 1028 (1989), which also dealt with a dispute between a non-Indian roofing contractor and an Indian Tribe over roofing contract work performed on two building projects located off the reservation. The New Mexico court in *Padilla* found that the tribe was not immune from suit.

The *Hoover* court held that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country." 909 P.2d at 62. It is not disputed that, in this instance, the construction project was on newly purchased land that was neither trust nor reservation land. Thus, we conclude that *Hoover* directly controls on the issue of tribal immunity.

The Tribe also claims the lower court erred in not *sua sponte* reviewing "patent legal issues and/or examining the damage evidence." However, the Tribe admits that it raised none of these "substantive issues" in the lower court. Parties are simply not permitted to raise issues on appeal that were not raised in the trial court. *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230, 1236 (Okla. 1989). "[I]t is well settled that a litigant may not remain silent and speculate on the outcome of the trial, and then complain on appeal." *Missouri-Kansas-Texas R.R. Co. v. Callison*, 383 P.2d 696, 699 (Okla. 1963).

The Tribe also complains of the award of attorney fees, based largely on the basis of immunity – an issue we have already resolved against it. It also complains that the award was supported by "insufficient and incomplete" evidence. Once again, this was not an issue raised in the lower court. However, we note that the lower court was presented with contemporaneous time records, which support the lower court's judgment. *State ex rel. Burk v. City of Oklahoma City*, 598 P.2d 659 (Okla. 1979). Furthermore, the record indicates that purportedly unrelated legal matters were all directed at maintaining the lawsuit in the District Court of Oklahoma County and in defending that court's jurisdiction over the dispute.

The judgment of the lower court is AFFIRMED in all regards.

GOODMAN, P.J., and BOUDREAU, J., concur.

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation,	)	
Appellee/Respondent,	)	No. 86,568
v.	)	
CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Appellant/Petitioner.	)	

ORDER

(Filed Mar. 3, 1997)

Appellant's motion to suspend effectiveness of the mandate is granted. The mandate shall issue, but its enforcement shall be stayed until the petition for certiorari is filed in the United States Supreme Court and for so long thereafter as certiorari proceedings are pending in that court. Appellant is directed to notify this Court or the filing of its petition for certiorari.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 3rd DAY OF MARCH, 1997.

/s/ Yvonne Kauger
CHIEF JUSTICE

KAUGER, C.J., HUGHES, LAVENDER, HARGRAVE, OPALA, and WILSON, JJ. – Concur

---

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

C & L ENTERPRISES, INC., an Oklahoma corporation,	)	
Appellee,	)	No. 86,568
v.	)	
CITIZEN BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA,	)	
Appellant.	)	

ORDER AND JUDGMENT ON SUPERSEDEAS BOND

(Filed Jan. 27, 1997)

Certiorari is denied. Appellee's motion for an appeal-related counsel fee is granted. 12 O.S. 1991 § 936; *Sisney v. Smalley*, Okl., 690 P.2d 1048, 1051 (1984). Following the issuance of mandate the trial court is authorized to determine the amount of the appeal-related counsel fee to be awarded to the appellee in an adversarial hearing after proper notice.

Appellee's motion for judgment on supersedeas bond is granted. Judgment is hereby rendered on the supersedeas bond against Citizen Potawatomi Nation as principal, and Mid-Continent Casualty Company, as surety, in the amount of $28,499.63 plus $11,077.39, with interest thereon at the statutory rate from October 27, 1995 and from March 21, 1996, respectively, until paid, not to

exceed the penal sum of the supersedeas bond. The district court is directed to enforce this judgment as if rendered in that court.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 27th DAY OF JANUARY, 1997.

/s/ Ralph B. Hodges
ACTING CHIEF JUSTICE

HODGES, LAVENDER, SIMMS, HARGRAVE, WILSON and WATT, JJ., concur.

OPALA, J., concur in denying certiorari; concur in part and dissent in part from the counsel-fee award judgment on supersedeas bond. The award is flawed because it does not include a certiorari-related fee. The judgment should be only against the surety.

KAUGER, C.J., SUMMERS, V.C.J., Dissent.

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

ORDER TAXING ATTORNEY FEES AND COSTS

(Filed March 21, 1996)

ON THIS DAY, there comes on for hearing Amended Application of Plaintiff for an order taxing attorney fees and costs, Plaintiff appearing by counsel of record and Defendant appearing not.

The Court having previously granted judgment for said Plaintiff wherein the Court ordered that Plaintiff shall recover its costs herein and a reasonable attorney's fee, pursuant to 12 O.S. § 936, and the court having further considered the statements of counsel, the applications filed herein, the time records of counsel for said Plaintiff, and the expenses incurred herein, the Court finds that the costs and attorney fees set forth below are reasonable and should be assessed against Defendant and taxed as part of the judgment herein.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED that Plaintiff, C & L ENTERPRISES

INC., shall have and recover of and from Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $10,545.00 which the Court determines to be a reasonable attorney's fee, additional accrued costs in the sum of $532.39 and all accruing costs, to be taxed with the Judgment previously entered herein.

DATED THIS 21 DAY OF March, 1996.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN, OBA #12763
Attorneys for Plaintiffs
2100 City Place
204 North Robinson
Oklahoma City, Oklahoma 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 21 day of March, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	
v.	)	CASE NO. CJ 95-5204-64
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

JOURNAL ENTRY OF JUDGMENT CONFIRMING ARBITRATION AWARD

(Filed Oct. 27, 1995)

ON THIS DAY, there comes on for hearing Petition of Plaintiff by Plaintiff's Motion for Confirmation of Arbitration Award, Plaintiff appearing by its attorney and Defendant appearing ~~by its attorney~~ not,

And the Court having reviewed Plaintiff's Petition filed pursuant to 15 O.S. § 815, the arbitration agreement at issue and the arbitration award entered between the parties on June 30, 1995, and Defendant not having urged vacation, modification or correction of said award within the time prescribed by 15 O.S. §§ 811-813,

The Court finds that said arbitration agreement, arbitration proceedings and arbitration award are consistent with and subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801-818 and that the Award of Arbitrator as attached to Plaintiff's Petition was

duly entered, is binding upon the parties and, for good cause shown, should be confirmed.

IT IS THEREFORE, CONSIDERED, ORDERED, and ADJUDGED by the Court that Plaintiff have and recover of and from Defendant, Judgment confirming the Award of Arbitrator attached to Plaintiff's Petition as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment at 8.31% per annum until paid, a reasonable attorneys' fee to be determined upon application of Plaintiff, accrued costs in the sum of $84.96, and all accruing costs.

DATED THIS 27 DAY OF OCTOBER, 1995.

/s/ Leamon Freeman
JUDGE OF THE
DISTRICT COURT

APPROVED FOR ENTRY:

GARVIN, AGEE, CARLTON & MASHBURN

BY: JOHN MASHBURN
JOHN MASHBURN – OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed this 27 day of October, 1995, to:

Michael Minnis, Esq.
Michael Minnis and Associates, P.C.
Liberty Tower, Suite 3160
100 North Broadway
Oklahoma City, OK 73102-8606

/s/ JOHN MASHBURN
JOHN MASHBURN

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Oct. 13, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
204 N. Robinson
Okc, OK 73102
232-9996

-vs- Case No. CJ-95-5204

Citizen Band Potawatomi Tribe of Oklahoma
a/k/a Citizen Band Potawatomi Indians of Oklahoma

Defendant(s)

/s/ Michael Minnis David McCullough
Attorney(s) for Defendant(s)
3160 Liberty Tower
100 N. Broadway,
Okc, OK 73102

COURT ORDER

Date: October 13, 1995 Judge Leamon Freeman
Hearing On: Motion to Reconsider
Ruling By Court: Denied

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT OF OKLAHOMA COUNTY,
STATE OF OKLAHOMA

(Filed Sep. 22, 1995)

C & L Enterprises, Inc.
Plaintiff(s)

/s/ John Mashburn
Attorney(s) for Plaintiff(s)
2100 City Place
Okc, OK 73102
232-9996

-vs-

Case No. CJ-95-5204-64

Citizen Band Potawatomi Tribe

Defendant(s)

/s/ Michael Minnis
Attorney(s) for Defendant(s)
3160 Liberty Tower
Okc, [sic] 73102
235-7686

COURT ORDER

Date: 9/22/95 Judge _____
Hearing On: Motion to Dismiss
Ruling By Court: Overruled, Defendant granted 20 days to answer.

/s/ Leamon Freeman
Judge

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES, INC.,

Plaintiff,

v. Case No. CJ-95-5204-64

CITIZEN BAND POTAWATOMI TRIBE
OF OKLAHOMA a/k/a CITIZEN BAND
POTAWATOMI INDIANS OF OKLAHOMA.

MOTION TO DISMISS
(Filed Aug. 25, 1995)

COMES NOW the Citizen Band Potawatomi Indian Tribe of Oklahoma ("Potawatomi"), appearing specially, and moves the court to enter an order dismissing the "Petition for Confirmation of Arbitration Award" (August 7, 1995) filed herein on the basis that this court lacks jurisdiction over the person of the "Potawatomi", that the Potawatomi lack the capacity to be sued, or, alternatively, that the service of process was insufficient. 12 O.S. 1991, § 2012, ¶¶ B.2, B.9 and B.5. Consistent with District Court Rule 4, this motion is accompanied by a concise brief.

MICHAEL MINNIS & ASSOCIATES, P.C.

By /s/ Michael Minnis
Michael Minnis, OBA #6251
David McCullough,
OBA #10898
3160 Liberty Tower
100 North Broadway
Oklahoma City, OK 73102
(405) 235-7686
ATTORNEYS FOR CITIZENS BAND POTAWATOMI INDIAN TRIBE OF OKLAHOMA

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of August, 1995, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

John Mashburn
2100 City Place
204 North Robinson
Oklahoma City, OK 73102

ATTORNEY FOR PLAINTIFF

/s/ Michael Minnis
Michael Minnis
David McCullough

IN THE DISTRICT COURT WITHIN AND FOR OKLAHOMA COUNTY STATE OF OKLAHOMA

C & L ENTERPRISES INC., an Oklahoma Corporation, Plaintiff,	)	CASE NO. CJ-95-5204-64
v.	)	
CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, Defendant.	)	

PETITION
FOR CONFIRMATION OF ARBITRATION AWARD

(Filed Aug. 7, 1995)

COMES NOW Plaintiff and for its cause of action against the Defendant and pursuant to 15 O.S. § 815, respectfully states and alleges the following:

1. On August 25, 1993, the parties entered into a contract, executed within the State of Oklahoma, whereby Plaintiff was to surface the roof of a building for The First Oklahoma Bank, in Shawnee, Oklahoma. A true and correct copy of said contract is attached hereto as Exhibit "A" and incorporated herein.

2. Said contract was executed, for Defendant, by three officers of the Defendant including the Defendant's Chairman, John A. Barrett, Jr., its Secretary Treasurer, Bob Davis, and one other currently unidentified officer.

3. Said officers had actual and/or apparent authority to bind Defendant upon said contract.

4. The land which is the subject of the construction contract at issue herein, although currently owned by the Defendant, is neither Indian reservation nor "trust" land and was not validly set apart for the use of the Defendant as such under the superintendence of the Federal Government.

5. Plaintiff believes and therefore alleges that Defendant obtained or used funds for construction of the above-referenced bank which were non-tribe funds; *for example,* Economic Development Grant or other government grant funds.

6. In the event "Tribal Sovereignty" could have otherwise attached to the transactions between the parties, which Plaintiff denies, such sovereignty was waived by Defendant pursuant to the terms of the contract whereby the parties agreed to submit any claims or disputes to arbitration and further agreed that the award rendered by the arbitrator would be final, and judgment could be entered upon it in accordance with applicable law in any court having jurisdiction thereof, all as set forth at Article 10.8 in Exhibit "A."

7. Plaintiff complied with the terms of said contract and presented its demand for arbitration upon the breach of Defendant.

8. On June 30, 1995, after receiving the written statements and documents of the parties and having heard the evidence presented, the Arbitrator duly rendered an award for the Plaintiff as set forth in Exhibit "B" which is attached hereto and incorporated herein.

9. Said arbitration agreement, arbitration proceedings and arbitration award are consistent with an subject to the provisions of the Oklahoma Uniform Arbitration Act, 15 O.S. §§ 801 - 818.

10. Jurisdiction is proper with this Court by reason of execution of said contract within Oklahoma and by application of 15 O.S. § 802.B.

11. Venue is proper with this Court by virtue of Defendant's waiver of venue in Article 10.8 of Exhibit "A," and pursuant to the requirements of 15 O.S. § 816 as the arbitration hearing occurred in Oklahoma County, Oklahoma.

12. Defendant has wholly failed and refused to pay said Arbitration Award thereby necessitating the filing of this action for which Plaintiff is entitled to additional attorney's fees and costs.

WHEREFORE, Plaintiff prays that the Court enter Judgment confirming the Arbitration Award attached hereto as Exhibit "B" and that Plaintiff have and recover of and from the Defendant, CITIZEN BAND POTAWATOMI TRIBE OF OKLAHOMA a/k/a CITIZEN BAND POTAWATOMI INDIANS OF OKLAHOMA, the sum of $28,414.67, with interest thereon from judgment according to law, a reasonable attorneys' fee and all costs of this action.

GARVIN, AGEE, CARLTON
& MASHBURN

BY: /s/ John Mashburn
JOHN MASHBURN –
OBA# 12763
Attorneys for Plaintiff
2100 City Place
204 North Robinson
Oklahoma City, OK. 73102
(405) 232-9996

PLAINTIFF'S
EXHIBIT
A

AIA Document A107

Abbreviated Form of Agreement
Between Owner and Contractor

For CONSTRUCTION PROJECTS OF LIMITED SCOPE where the Basis of Payment is a STIPULATED SUM

1987 EDITION

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION.

This document includes abbreviated General Conditions and should not be used with other general conditions. It has been approved and endorsed by The Associated General Contractors of America.

AGREEMENT

made as of the Twenty-Fifth day of August in the year of Nineteen Hundred and Ninety-Three

BETWEEN the Owner: Citizen Band Potawatomi
(Name and address) Tribe of Oklahoma
1901 South Gordon Cooper Drive
Shawnee, Oklahoma 74801

and the Contractor: C & L Enterprises Inc.
(Name and address) P.O. Box 406
Lindsay, Oklahoma 73052

The Project is: *(Name and location)*	The Building for The First Oklahoma Bank Shawnee, Oklahoma Project Number 9202
The Architect is: *(Name and address)*	Price Group Architects and Planners 14 East 9th Shawnee, Oklahoma 74801 273-2200

The Owner and Contractor agreed as set forth below.

Don Dunning
Mobil – 620-1590

660-5700-
PAGER

Call Don on Ap 25 11:30

Copyright 1936, 1951, 1958, 1961, 1963, 1966, 1974, 1978, © 1987 by The American Institute of Architects, 1735 New York Avenue, N.W. Washington, D.C. 20006. Reproduction of the material herein or substantial quotation of its provisions without written permission of the AIA violates the copyright laws of the United States and will be subject to legal prosecution.

ARTICLE 1

THE WORK OF THIS CONTRACT

1.1 The Contractor shall execute the entire Work described in the Contract Documents, except to the extent

specifically indicated in the Contract Documents to be the responsibility of others, or as follows:

Furnish roofing consisting of Perlite Board Foam Insulation, 1 Inch, 52 Mils Neogard 70613 Series Coating, Five Year Warranty, One Year Defect Bond, Eleven (11) RoofDrains, Cap Flashing.

See Attachment #1

ARTICLE 2

DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

2.1 The date of commencement is the date from which the Contract Time of Paragraph 2.2 is measured, and shall be the date of this Agreement, as first written above, unless a different date is stated below or provision is made for the date to be fixed in a notice to proceed issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or if applicable, state that the date will be fixed in a notice to proceed.)

Date will be fixed per notice to proceed.

2.2 The Contract shall achieve Substantial Completion of the entire Work not later than

(Insert the calendar date or number of calendar days after the date of commencement. Also insert any requirements for earlier Substantial Completion of certain portions of the Work, if not stated elsewhere in the Contract Documents.)

Per construction managers schedules.

subject to adjustment of the Contract Time as provided in the Contract Documents.

(Insert provisions, if any for liquidated damages relating to failure to complete on time.)

ARTICLE 3

CONTRACT SUM

3.1 The Owner shall pay the Contractor in current funds for the Contractor's performance of the Contract the Contract Sum of Eighty-Five Thousand Dollars ($85,000.00), subject to additions and deductions as provided in the Contract Documents.

3.2 The Contract Sum is based upon the following alternates. If any, which are described in the Contract Documents and are hereby accepted by the Owner:

(State the numbers or other identification of accepted alternates. If decisions on other alternates are to be made by the Owner subsequent to the execution of this Agreement, attach a schedule of such other alternates showing the amount for each and the date until which that amount is valid.)

Not applicable

3.3 Unit prices, if any, are as follows:

None

ARTICLE 4

PROGRESS PAYMENTS

4.1 Based upon Applications for Payments submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as provided below and elsewhere in the Contract Documents. The period covered by each Application for Payment shall be one calendar month ending on the last day of the month, or as follows:

> Applications for payment to be submitted on or before the 25th day of each month. Payment of said application due on or before the 5th day of the following month.

4.2 Payments due and unpaid under the Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Contractor's principal places of business. The location of the project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 5

FINAL PAYMENT

5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Contractor when the Work has been completed, the Contract fully performed, and a final Certificate for Payment has been issued by the Architect.

ARTICLE 6

ENUMERATION OF CONTRACT DOCUMENTS

6.1 The Contract Documents are listed in Article 7 and, except for Modifications issued after execution of this Agreement, are enumerated as follows:

6.1.1 The Agreement is this executed Abbreviated Form of Agreement Between Owner and Contractor, AIA Document A107, 1987 Edition.

6.1.2 The Supplementary and other Conditions of the Contract are those contained in the Project Manual dated ___, and are as follows:

Document ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.3. The Specifications are those contained in the Project Manual dated as in Subparagraph 6.1.2., and are as follows:

(Either list the Specifications here or refer to an exhibit attached to this Agreement.)

Section ___ Title ___ Pages ___

Per Plans and Specifications.

6.1.4 The Drawings are as follows, and are dated ___ unless a different date is shown below:

(Either list the Drawings here or refer to an exhibit attached to this Agreement.)

Number ___ Title ___ Date ___

Per Plans and Specifications.

6.1.5 The Addenda, if any, are as follows.

Number ___ Date ___ Pages ___

Portions of Addenda relating to bidding requirements are not part of the Contract Documents unless the bidding requirements are also enumerated in this Article 6.

6.1.6 Other documents, if any, forming part of the Contract Documents are as follows:

(List any additional documents which are intended to form part of the Contract Documents.)

GENERAL CONDITIONS

ARTICLE 7

CONTRACT DOCUMENTS

7.1 The contract documents consist of this Agreement with Conditions of the Contract (General, Supplementary and other Conditions). Drawings, Specifications, addenda issued prior to the execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement. The intent of

the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and reasonably inferable from them as being necessary to produce the intended results.

7.2 The Contract Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Contractor, (2) between the Owner and a Subcontractor or Sub-subcontractor or (3) between any persons or entities other than the Owner and Contractor.

7.3 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site and become familiar with the local conditions under which the Work is to be performed.

7.4 The term "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project.

ARTICLE 8

OWNER

8.1 The Owner shall furnish surveys and a legal description of the site.

8.2 Except for permits and fees which are the responsibility of the Contractor under the Contract Documents, the Owner shall secure and pay for necessary approvals, easements, assessments and charges required for the construction, use or occupancy of permanent structures or permanent changes in existing facilities.

8.3 If the Contractor fails to correct Work which is not in accordance with the requirements of the Contract Documents or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Contractor to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, the right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

ARTICLE 9

CONTRACTOR

9.1 The Contractor shall supervise and direct the Work, using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless Contract Documents give other specific instructions concerning these matters.

9.2 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution

and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

9.3 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

9.4 The Contractor warrants to the Owner and Architect that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform with the requirements of the Contract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

9.5 Unless otherwise provided in the Contract Documents, the Contractor shall pay sales, consumer use, and other similar taxes which are legally enacted when bids are received or negotiations concluded, whether or not yet effective or merely scheduled to go into effect, and shall secure and pay for the building permit and other

permits and governmental fees, licenses and inspections necessary for proper execution and completion of the Work.

9.6 The Contractor shall comply with and give notices required by laws, ordinances, rules, regulations, and lawful orders of public authorities bearing on performance of the Work. The Contractor shall promptly notify the Architect and Owner if the Drawings and Specifications are observed by the Contractor to be at variance therewith.

9.7 The Contractor shall be responsible to the Owner for the acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons performing portions of the Work under a contract with the Contractor.

9.8 The Contractor shall review, approve, and submit to the Architect Shop Drawings, Product Data, Samples and similar submittals required by the Contract Documents with reasonable promptness. The Work shall be in accordance with approved submittals. When professional certification of performance criteria materials, systems or equipment is required by the Contract Documents, the Architect shall be entitled to rely upon the accuracy and completeness of such certifications.

9.9 The Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor's tools, construction equipment, machinery and surplus materials.

9.10 The Contractor shall provide the Owner and Architect access to the Work in preparation and progress wherever located.

9.11 The Contractor shall pay all royalties and license fees; shall defend suits or claims for infringement of patent rights and shall hold the Owner harmless from loss on account thereof, but shall not be responsible for such defense or loss when a particular design, process or product of a particular manufacturer or manufacturers is required by the Contract Documents unless the Contractor has reason to believe that there is an infringement of patent.

9.12 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in this Paragraph 9.12.

9.12.1 In claims against any person or entity indemnified under this Paragraph 9.12 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Paragraph 9.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for the Contractor or a Subcontractor under workers or workmen's compensation acts, disability benefit acts or other employee benefit acts.

9.12.2 The obligations of the Contractor under this Paragraph 9.12 shall not extend to the liability of the Architect, the Architect's consultants, and agents and employees of any of them arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, Construction Change Directives, designs or specification, or (2) the giving of or the failure to give directions or instructions by the Architect, the Architect's consultants, and agents and employees of any of them provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 10

ADMINISTRATION OF THE CONTRACT

10.1 The Architect will provide administration of the Contract and will be the Owner's representative (1) during construction, (2) until final payment is due and (3) with the Owner's concurrence, from time to time during the correction period described in Paragraph 18.1.

10.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally

familiar with the progress and quality of the completed Work and to determine in general if the Work is being performed in a manner indicating that the Work, when completed, will be in accordance with the Contract Documents. However, the Architect will not be required to make exhaustive or continuous on-site inspections to check quality or quantity of the Work. On the basis of on-site observations as an architect, the Architect will keep the Owner informed of progress of the Work and will endeavor to guard the Owner against defects and deficiencies in the Work.

10.3 The Architect will not have control over or charge of and will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility as provided in Paragraphs 9.1 and 16.1. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

10.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due the Contractor and will issue Certificates for Payment in such amounts.

10.5 The Architect will interpret and decide matters concerning performance under and requirements of the Contract Documents on written request of either the Owner or Contractor. The Architect will make initial decisions on all claims, disputes or other matters in question between the Owner and Contractor, but will not be liable for

results of any interpretations or decisions rendered in good faith. The Architect's decisions in matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents. All other decisions of the Architect, except those which have been waived by making or acceptance or final payment, shall be subject to arbitration upon the written demand of either party.

10.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

10.7 The Architect will review and approve or take other appropriate action upon the Contractor's submittals such as Shop Drawings. Product Data and Samples, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

10.8 All claims or disputes between the Contractor and the Owner arising out or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction industry Arbitration Rules of the American Arbitration Association currently in effect unless the parties mutually agree otherwise and subject to an initial presentation of the claim or dispute to the Architect as required under Paragraph 10.5. Notice of the demand for arbitration shall be filed in writing with the other party to this Agreement and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen. The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof. Except by written consent of the person or entity sought

to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law, (2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect or any of the Architect's employees or consultants. The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein shall be specifically enforceable under applicable law in any court having jurisdiction thereof.

ARTICLE 11

SUBCONTRACTS

11.1 A subcontractor is a person or entity who has a direct contract with the Contractor to perform a portion of the Work at the site.

11.2 Unless otherwise stated in the Contract Documents or the bidding requirements, the Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner through the Architect the names of the Subcontractors for each of the principal portions of the Work. The Contractor shall not contract with any Subcontractor to whom the Owner or Architect has made reasonable and timely objection. The Contractor shall not

be required to contract with anyone to whom the Contractor has made reasonable objection. Contracts between the Contractor and Subcontractors shall (1) require each Subcontractor, to the extent of the Work to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and Architect, and (2) allow to the Subcontractor the benefit of all rights, remedies and redress afforded to the Contractor by these Contract Documents.

ARTICLE 12

CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS

12.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under conditions of the contract identical or substantially similar to these, including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such claim as provided elsewhere in the Contract Documents.

12.2 The Contractor shall afford the Owner and separate contractors reasonable opportunity for the introduction

and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

12.3 Costs caused by delays, improperly timed activities or defective construction shall be borne by the party responsible therefor.

ARTICLE 13

CHANGES IN THE WORK

13.1 The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions or modifications, the Contract Sum and Contract Time being adjusted accordingly. Such changes in the Work shall be authorized by written Change Order signed by the Owner, Contractor and Architect, or by written Construct Change Directive signed by the Owner and Architect.

13.2 The Contract Sum and Contract Time shall be changed only by Change Order.

13.3 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

ARTICLE 14

TIME

14.1 Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Agreement the Contractor confirms that the Contract Time is a reasonable period for performing the Work.

14.2 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 15.3.

14.3 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions not reasonably anticipatable, unavoidable casualties or any causes beyond the Contractor's control, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 15
PAYMENTS AND COMPLETION

15.1 Payments shall be made as provided in Articles 4 and 5 of this Agreement.

15.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed by third parties, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) reasonable evidence that the Work cannot be completed for the unpaid balance of the Contract Sum, (5) damage to the Owner or another contractor, (6) reasonable evidence that the Work will not be completed within the Contract Time and that the unpaid balance would not be adequate to cover actual or liquidated damages for the anticipated delay, or (7) persistent failure to carry out the Work in accordance with the Contract Documents.

15.3 When the Architect agrees that the Work is substantially complete, the Architect will issue a Certificate of Substantial Completion.

15.4 Final payment shall not become due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner to indemnify the Owner against such lien. If such lien remains unsatisfied after payments are made, the Contractor shall refund to the Owner all money that the Owner may be compelled to pay in discharging such lien, including all costs and reasonable attorneys' fees.

15.5 The making of final payment shall constitute a waiver of claims by the Owner except those arising from:

.1 liens, claims, security interests or encumbrances arising out of the Contract and unsettled;

.2 failure of the Work to comply with the requirements of the Contract Documents; or

.3 terms of special warranties required by the contract documents.

Acceptance of final payment by the Contractor, a Subcontractor or material supplier shall constitute a waiver of claims by the payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

ARTICLE 16

PROTECTION OF PERSONS AND PROPERTY

16.1 The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the performance of the Contract. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable protection to prevent damage, injury or loss to:

.1 employees on the Work and other persons who may be affected thereby;

.2 the Work and materials and equipment to be incorporated therein; and

.3 other property at the site or adjacent thereto.

The Contractor shall give notices and comply with applicable laws, ordinances, rules, regulations and lawful orders of public authorities bearing on safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy damage and loss to property at the site caused in whole or in part by the Contractor, a Subcontractor, a Sub-subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable and for which the Contractor is responsible under Subparagraphs 16.1.2 and 16.1.3, except for damage or loss attributable to acts or omissions of the Owner or Architect or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractor. The foregoing obligations of the Contractor are in addition to the Contractor's obligations under Paragraph 9.12.

16.2 The Contractor shall not be required to perform without consent any Work relating to asbestos or polychlorinated biphenyl (PCB).

ARTICLE 17
INSURANCE

17.1 The Contractor shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located insurance for protection from claims under workers' or workmen's compensation acts and other employee benefit acts which are applicable, claims for damages because of bodily injury, including death, and from claims for damages, other than to the Work itself, to property which may arise out of or result from the Contractor's operations under the Contract, whether such operations be by the Contractor or by a Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than limits of liability specified in the Contract Documents or required by law, whichever coverage is greater, and shall include contractual liability insurance applicable to the Contractor's obligations under Paragraph 9.12. Certificates of such insurance shall be filed with the Owner prior to the commencement of the Work.

17.2. The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance. Optionally, the Owner may purchase and maintain other insurance for self-protection against claims which may arise from operations under the Contract. The Contractor shall not be responsible for purchasing and maintaining

this optional Owner's liability insurance unless specifically required by the Contract Documents.

17.3 Unless otherwise provided, the Owner shall purchase and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located, property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall be on an all-risk policy form and shall include interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of fire and extended coverage and physical loss or damage including, without duplication of coverage, theft, vandalism and malicious mischief.

17.4. A loss insured under Owner's property insurance shall be adjusted with the Owner and made payable to the Owner as fiduciary for the insureds, as their interests may appear, subject to the requirements of any applicable mortgagee clause.

17.5 The Owner shall file a copy of each policy with the Contractor before an exposure to loss may occur. Each policy shall contain a provision that the policy will not be cancelled or allowed to expire until at least 30 days' prior written notice has been given to the Contractor.

17.6 The Owner and Contractor waive all rights against each other and the Architect, Architect's consultants, separate contractors described in Article 12, if any, and any of their subcontractors, sub-subcontractors, agents and employees, for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Article 17 or any other property insurance applicable to the Work, except such rights as they may

have to the proceeds of such insurance held by the Owner as fiduciary. The Contractor shall require similar waivers in favor of the Owner and the Contractor by Subcontractors and Sub-subcontractors. The Owner shall require similar waivers in favor of the Owner and Contractor by the Architect, Architect's consultants, separate contractors described in Article 12, if any, and the subcontractors, sub-subcontractors agents and employees of any of them.

ARTICLE 18

CORRECTION OF WORK

18.1. The Contractor shall promptly correct Work rejected by the Architect or failing to conform to the requirements of the Contract Documents, whether observed before or after Substantial Completion and whether or not fabricated, installed or completed, and shall correct any Work found to be not in accordance with the requirements of the Contract Documents within a period of one year from the date of Substantial Completion of the Contract or by terms of an applicable special warranty required by the Contract Documents. The provisions of this Article 18 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

18.2 Nothing contained in this Article 18 shall be construed to establish a period of limitation with respect to other obligations which the Contractor might have under the Contract Documents. Establishment of the time period of one year as described in Paragraph 18.1 relates only to the specific obligation of the Contractor to correct

the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

ARTICLE 19

MISCELLANEOUS PROVISIONS

19.1 The Contract shall be governed by the law of the place where the Project is located.

19.2 As between the Owner and the Contractor, any applicable statute of limitations shall commence to run and any alleged cause of action shall be deemed to have accrued:

.1 not later than the date of Substantial Completion for acts or failures to act occurring prior to the relevant date of Substantial Completion:

.2 not later than the date of issuance of the final Certificate for Payment for acts or failures to act occurring subsequent to the relevant date of Substantial Completion and prior to issuance of the final Certificate for Payment; and

.3 not later than the date of the relevant act or failure to act by the Contractor for acts or failures to act occurring after the date of the final Certificate for Payment.

ARTICLE 20

TERMINATION OF THE CONTRACT

20.1 If the Architect fails to recommend payment for a period of 30 days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of 30 days, the Contractor may, upon seven additional days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials, equipment, tools, and construction equipment and machinery, including reasonable overhead, profit and damages applicable to the Project.

20.2 If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform a provision of the Contract, the Owner, after seven days' written notice to the Contractor and without prejudice to any other remedy the Owner may have, may make good such deficiencies and may deduct the cost thereof, including compensation for the Architect's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Alternatively at the Owner's option, and upon certification by the Architect that sufficient cause exists to justify such action, the Owner may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient. If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the Architect's services and expenses

made necessary thereby, such excess shall be paid to the Contractor, but if such costs exceed such unpaid balance, the Contractor shall pay the difference to the Owner.

ARTICLE 21

OTHER CONDITIONS OR PROVISIONS

Attachment Page 1.

This Agreement entered into as of the day and year first written above.

OWNER /s/ John A. Barrett, Jr. CONTRACTOR

/s/ Bob F. Davis Sec/Trea.
(Signature)

/s/ Lynn D. Scruggs
(Signature)

/s/ Hilton L. Melot
(Printed name and title)

C & L Enterprises Inc.
(Printed name and title)

[LOGO] Caution: You should sign an original AIA document which has this caution printed in red. An original assures that changes will not be obscured as may occur when documents are reproduced.

PROPOSAL

P.O. Box 406
Lindsay OK 73052
Lynn Scruggs 756-8415

No.
Date July 25, 93
Sheet No.

Proposal Submitted To:

Name Pottawatomi Tribe
Street 1901 S. Gordon
Cooper Drive
City Shawnee, OK 74801
State
Phone Mr. Don Dunning
275-3121

Work To Be Performed At:

RE: First Oklahoma Bank
Street
City State
Date of Plans
Architect
Fax 335-0198

We hereby propose to furnish the materials and perform the labor necessary for the completion of

Roof on Bank – Project #9202 – The Price Group

Roof Bid – Perlite Board, Foam Insulation, 1 inch
52 Mils Neosard - 70613 Series Coating
Five Year Warranty
One Year Defect Bond
11 Roof Drains
Cap Flashing

All material is guaranteed to be as specified, and the above work to be performed in accordance with the drawings and specifications submitted for above work and completed in a substantial workmanlike manner for the sum of Eighty Five thousand dollars Dollars ($ 85,000).

with payments to be made as follows: _____

Any alteration or deviation from above specifications involving extra costs, will be executed only upon written orders, and will become an extra charge over and above the estimate. All agreements contingent upon strikes, accidents or delays beyond our control. Owner to carry fire, tornado and other necessary insurance upon above work. Workmen's compensation and Public Liability insurance on above work to be taken out by

Respectfully submitted
/s/ Lynn W. Scruggs
Per /s/ Lynn W. Scruggs

Note – This proposal may be withdrawn by us if not accepted within ___ days.

ACCEPTANCE OF PROPOSAL

The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Date

Signature

Signature

PLAINTIFF'S EXHIBIT B

AMERICAN ARBITRATION ASSOCIATION

CONSTRUCTION INDUSTRY ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Re: 71 E 110 00024 95
C & L Enterprises, Inc.
vs.
Citizen Band Potawatomi Tribe of Oklahoma
Oklahoma City, OK

ADMINISTRATOR: Tracey L. Hegeman

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties, and dated August 25, 1993, and having been duly sworn and having duly heard the proofs and allegations of C & L Enterprises, Inc. ("C & L"), and Citizen Band Potawatomi Tribe of Oklahoma ("Potawatomi") having failed to appear after due notice by mail in accordance with the Commercial Arbitration Rules of the American Arbitration Association ("Association"), hereby, AWARD, as follows:

Potawatomi shall pay to C & L the sum of Twenty Five Thousand Four Hundred Dollars and No Cents ($25,400.00).

Potawatomi shall pay to C & L the sum of Two Thousand Two Hundred Thirty Dollars and No Cents ($2,230.00) for attorney's fees.

Potawatomi shall pay to C & L the sum of Thirty Four Dollars and Sixty Seven Cents ($34.67) for attorney's costs.

The administrative fees of the American Arbitration Association totaling $763.00 shall be borne by Potawatomi. Therefore, Potawatomi shall pay to C & L the sum of $750.00 representing that portion of C & L's share of administrative fees previously paid to the Association. Potawatomi shall pay to the Association the sum of $13.00 representing that portion of Potawatomi's share of administrative expenses still due the Association.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This Award is in full settlement of all claims submitted in this Arbitration. All claims not expressly granted herein are, hereby, denied.

DATE: June 30, 1995

SIGNED: /s/ Peter B. Bradford
Peter B. Bradford, Arbitrator

Supreme Court
F I L E D
MAY 29 1997
CLERK

No. 96-1721

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,

Petitioner,

v.

C&L ENTERPRISES, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN D. MASHBURN
Counsel of Record
JAMES W. CARLTON JR.
GARVIN, AGEE, CARLTON
& MASHBURN
2100 City Place
204 North Robinson
Oklahoma City, OK 73102
(405) 232-9996 FAX (405) 232-4061
Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Is an arbitration agreement contained in a contract between an Indian tribe and a non-Indian, for commercial development outside any reservation or trust land boundaries, enforceable by arbitration proceedings provided for in the agreement?

2. May an Indian tribe be sued in state court to confirm an award upon such arbitration proceedings where the agreement provides:

> The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof . . . ?

3. Does execution of such a contract and arbitration agreement constitute a waiver of any sovereign immunity from suit which Petitioner asserts existed for such commercial development outside any reservation or trust land boundaries?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Authorities iii

Statement of the Case 1

Reasons for Denying the Writ 6

Argument 6

Proposition 1: The Oklahoma Supreme Court decision below is consistent with the relevant decisions of this Court 7

Proposition 2: The ruling of the District Court of Oklahoma County as affirmed by the Oklahoma Court of Appeals was otherwise proper based upon the explicit waiver of sovereign immunity by execution of the arbitration agreement and such ruling is consistent with the decisions of other United States Courts of Appeals interpreting similar arbitration clauses 12

Proposition 3: The contract at issue did not require approval under 25 U.S.C. § 81 (1958) as was necessarily determined by the arbitrator and Petitioner did not timely and properly raise this issue in the proceeding before the District Court of Oklahoma County 18

Conclusion 22

TABLE OF AUTHORITIES

Page

CASES CITED:

Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958) 19, 20

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993) 19, 21

DeFeo v. Ski Apache Resort, 904 P.2d 1065 (N.M.App. 1995), *cert. denied*, 903 P.2d 844 (N.M. 1995) 11

Hoover v. Kiowa Tribe of Oklahoma, 990 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996) ... 5, 11

In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422 (D.Minn. 1993) 20

Maxa v. Yakima Petroleum, Inc., 924 P.2d 372 (Wash.App.Div.3 1996) 11

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973) 7, 8, 10, 11

Mission Indians v. American Management & Amusement, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988) 18, 21

Narrangansett Indian Tribe v. Ribo, Inc., 686 F.Supp. 48 (D.R.I. 1988) 19, 20

Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) 12, 14, 21

Oklahoma Tax Commission v. Graham, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989) 9, 10, 11

Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505, 111 S.Ct. 907 (1991) 8, 10

TABLE OF AUTHORITIES – Continued

Page

Organized Village of Kake v. Egan, 369 U.S. 60, 82 S.Ct. 562 (1962) 7, 8, 11

Padilla v. Pueblo of Acoma, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) 10, 11

Prima Paint Corporation v. Flood & Conklin Mfg., 388 U.S. 395, 87 S.Ct. 1801 (1967) 17

Rosebud Sioux Tribe v. Val-U Construction, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995) 15

Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc., 757 F.2d 221 (10th Cir. 1985) 22

Sac and Fox Nation v. Hanson, 47 F.3d 1061 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 57 (1995) 11

Sokaogon Gaming Enterprise v. Tushie-Montgomery Association, 86 F.3d 656 (7th Cir. 1996) 16, 17

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 13, 14

Val/Del, Inc., v. Superior Court, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985) 13, 14

Wisconsin Winnebago Business Comm. v. Koberstein, 762 F.2d 613 (7th Cir. 1985) 21

STATUTES CITED:

12 O.S. § 611 4

15 O.S. § 802.B 18

15 O.S. § 811 5

TABLE OF AUTHORITIES – Continued

Page

15 O.S. § 812 5

15 O.S. § 813 5

25 U.S.C. § 81 ..... 4, 18, 19, 20, 21, 22

25 U.S.C. § 177 ..... 19, 20

RULES CITED:

Sup.Ct.R. 24.6 7

OTHER CITATIONS:

Rule 23, American Arbitration Association, Construction Industry Arbitration Rules 3

Rule 30, American Arbitration Association, Construction Industry Arbitration Rules 3

Rule 47(c), American Arbitration Association, Construction Industry Arbitration Rules 15

STATEMENT OF THE CASE

Petitioner presented to Respondent a proposed contract for Respondent's construction of the roof upon a bank building on non-reservation, non-trust land owned by Petitioner. While admittedly an American Institute of Architects form agreement, the contract terms and provisions not set forth in the form were drafted by Petitioner and/or its architect. The contract contained an arbitration agreement providing:

> All claims or disputes between the Contractor and the Owner arising out [of] or relating to the Contract, or the breach thereof, shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . . The award rendered by the arbitrator or arbitrators shall be final, and **judgment may be entered upon it** in accordance with applicable law in any court having jurisdiction thereof . . . The agreement herein among the parties to the Agreement and any other written agreement to arbitrate referred to herein **shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**

(Petition at App. 36, 37, Article 10.8) (emphasis added).

Petitioner states that the architect advised Petitioner that the roof type should be changed due to birds eating holes in another foam roof. The record does not support that it was the architect's decision and makes no mention of birds damaging such a roof. Rather, the Construction

Change Directive was issued by both Petitioner and the architect.[1]

Petitioner states that C&L submitted a new or revised bid. This is a misstatement of fact. Rather, C&L offered to reduce the Contract sum by $6,600.00 pursuant to the Contract's provision that "the Contract Sum . . . shall be changed only by Change Order" which must be signed by the Owner, Contractor and Architect, and that "the cost or credit to the Owner for changes in the Work shall be determined by mutual agreement." Moreover, the record below is devoid of any evidence that the offered reduction in contract sum was $21,616.00 higher than the lowest "bid."[2]

Prior to learning of Petitioner's re-bidding of the Contract, Respondent entered into a Sub-Contract Agreement (as allowed by the Contract) with Oklahoma Roofing & Sheet Metal, Inc., on April 19, 1994. The Contract Sum remained $85,000.00 (Petitioner did not accept Respondent's offered reduction) and Petitioner had subcontracted for the services to be performed for a total cost

---

[1] Exhibit "B" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

[2] Petition at App. 39, Article 13; Objection to Defendant's Motion to Dismiss, p. 2. *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

of $53,400.00. Therefore, Respondent's actual lost profit from the Petitioner's breach was $31,600.00.[3]

Petitioner states that the arbitration award was a "default award." The record does not support this. Petitioner was represented by its current counsel and repeatedly corresponded to AAA (the American Arbitration Association) setting forth fully its arguments and authorities regarding the factual issues and, specifically, arguments alleging sovereign immunity from suit. Moreover, in the arbitration hearing Respondent was required to and did present exhibits, testimony and argument to prove its claim as noted in the Arbitration Award and as required by Rule 30 of the Construction Industry Arbitration Rules of AAA which provides:

> An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.[4]

Petitioner complains that the arbitration award does not mention tribal sovereign immunity or explain how the award was computed. However, under Rule 23 of the Construction Industry Arbitration Rules of AAA, Petitioner could have requested a stenographic record of the proceedings.

---

[3] Objection to Defendant's Motion to Dismiss, pp. 2, 3, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma;* Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

[4] Exhibits "C," "D," "E" and "F" to Objection to Defendant's Motion to Dismiss, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma;* Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

Respondent thereafter brought suit to confirm the arbitration award consistent with state law and the terms of the arbitration agreement. In response to Petitioner's motion to dismiss the state court action, Respondent specifically raised the proposition that the execution of the arbitration agreement waived whatever sovereign suit immunity existed as to the Contract at issue and that because the contract between Petitioner and Respondent was – without dispute – executed outside of Indian Country, sovereign immunity never attached and the contract was properly enforceable by arbitration and ultimately in state court.[5]

Petitioner did not timely and properly raise the federal issue of the applicability of 25 U.S.C. § 81 (1958) before the District Court. Rather, Petitioner relegated the same to a single footnote which alleges application of the statute in a purely conclusive manner without any mention of its essential elements or any factual basis for the District Court to determine its application.

Petitioner next complains that the District Court disposed of Petitioner's motion to dismiss and motion for reconsideration with general orders denying the same. However, Petitioner could have requested such specific findings pursuant to 12 O.S. § 611 (1991) whereupon the District Court would have been obligated to render separate findings of fact and conclusions of law. In the absence of the same, it is obvious that the District Court

---

[5] Objection to Defendant's Motion to Dismiss, pp. 4-10, *C & L Enterprises Inc., v. Citizen Band Potawatomi Tribe of Oklahoma*; Case No. CJ 95-5204-64 (Okla. Co. Dist. Ct. filed Sep. 11, 1995).

found merit with either or both of Respondent's contentions. That is, that sovereign immunity never attached or that the same was waived by the arbitration agreement.

Petitioner failed to make application for an order vacating, modifying or correcting the Arbitration Award within ninety days after delivery of a copy of the Award to Petitioner as required by 15 O.S. §§ 812, 813. Thereupon, Respondent filed its Motion for Confirmation of Arbitration Award (although the same was specifically contained in Respondent's Petition for Confirmation) again giving Petitioner notice of the same and the hearing set. Petitioner chose not to appear or otherwise oppose the motion and the trial Court accordingly entered Judgment confirming the Award as mandated by 15 O.S. § 811. (Petition at App. 11, 12).

Subsequently, pursuant to Oklahoma law, Respondent made an original and amended fee application giving notice of the application for fees and hearing date thereon to Petitioner. Petitioner failed to appear or otherwise respond to such fee applications and the same were granted by the Oklahoma County District Court after consideration of the detailed supporting time statements presented by Respondent's counsel. (Petition at App. 4).

Without reaching the question of whether the execution of the arbitration agreement constituted a waiver of sovereign immunity, the Oklahoma Court of Appeals affirmed the District Court judgments based on the ruling in *Hoover v. Kiowa Tribe of Oklahoma*, 990 P.2d 59 (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996) discussed below.

REASONS FOR DENYING THE WRIT

1. The writ should be denied because the state court of last resort reached a decision consistent with the relevant decisions of this Court.

2. The writ should be denied because the ruling of the District Court of Oklahoma County as affirmed by the Oklahoma Court of Appeals and Oklahoma Supreme Court was otherwise proper based upon the waiver of sovereign immunity by execution of the arbitration agreement and such ruling is consistent with the decisions of other United States Courts of Appeals interpreting similar arbitration clauses.

ARGUMENT

In its argument to this Court, Petitioner initially sets out authorities supporting the power of the Federal Government to regulate Indian commerce and Indian tribes – which is not disputed. Then, Petitioner embarks upon a leap of logic to assert that the State of Oklahoma is regulating Indian commerce in contravention of the Constitution.

In fact, this Court's pronouncements as to the States' authority over an Indian tribe's commercial endeavors outside of its reservation, such as in the present case, are clearly supportive of the Oklahoma Supreme Court's holdings criticized by Petitioner. It is Petitioner's broad sweeping argument of exclusive Federal Government jurisdiction over all Indian matters which ignores established precedent.

Petitioner's doomsday characterization of the Oklahoma Supreme Court embarking upon a course to "confiscate Indian lands and other assets for the benefit of non-Indians" can only be described as scandalous and in violation of Supreme Court Rule 24.6.

Proposition 1: The Oklahoma Supreme Court decision below is consistent with the relevant decisions of this Court.

Obviously, no serious consideration of a State Court's jurisdiction over disputes with Indian tribes can be attempted without consideration of this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962), and its progeny.[6] There, in reviewing the Alaska Supreme Court's decision regarding a fishing rights dispute, this Court stated:

> State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation.

Id. at 369 U.S. 75, 82 S.Ct. 571.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 115 (1973), this Court considered sovereign immunity in the context of an Indian Tribe's protest of New Mexico's use tax assessment. The tax assessment related to the Tribe's construction and operation of a ski resort located outside the Tribe's trust or reservation land. This Court's opening comments have particular bearing upon the position taken by Petitioner:

---

[6] Petitioner omits any reference to or discussion of *Organized Village of Kake.*

> At the outset, **we reject** – as did the state court – **the broad assertion that the Federal Government has exclusive jurisdiction of the Tribe for all purposes** and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise '[w]hether the enterprise is located on or off tribal land.' Generalizations on this subject have become particularly treacherous.

Id. at 411 U.S. 147, 148, 93 S.Ct. 1270. (emphasis added).

The Court, citing *Organized Village of Kake v. Egan*, stated:

> But tribal activities conducted outside the reservation present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' Absent express federal law to the contrary, **Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State.**

Id. at 411 U.S. 148, 149, 93 S.Ct. 1270. (citations omitted) (emphasis added).[7]

Directly on point as to whether the Petitioner's asserted Tribal immunity deprived the Oklahoma County District Court of jurisdiction to hear the state law general contract claims brought by Respondent is this Court's

---

[7] Petitioner omits any reference to or discussion of *Mescalero* despite this Court's lengthy discussion of the same in a previous appeal by this Petitioner. *See Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905 (1991).

ruling in *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 109 S.Ct. 1519, 103 L.Ed.2d 924 (1989). There, the State of Oklahoma brought an action against an Indian tribe to recover excise taxes from bingo games and cigarette sales. The tribe removed the action to the U.S. District Court and the state moved to remand. The District Court denied the motion to remand and dismissed the suit ruling that it was barred by sovereign immunity.

The Tenth Circuit Court of Appeals affirmed. This Court vacated the Tenth Circuit's decision and remanded. The Tenth Circuit Court of Appeals, on reconsideration, adhered to its original decision. This Court then granted certiorari and reversed stating:

> The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint" rule . . . [Jurisdiction] 'must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, **unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.**' Tribal immunity may provide a federal defense to Oklahoma's claims. **But it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.** The possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, **and there was no independent bases for original federal jurisdiction** to support removal.
>
> **The jurisdictional question in this case is not affected by the fact that tribal immunity is**

> **governed by federal law**. As the dissent below observed, Congress has expressly provide by statute for removal when it desired federal courts to adjudicate defenses based on federal immunities.

Graham, at 489 U.S. 840-842, 109 S.Ct. 1521. (citations omitted) (emphasis added).[8]

Remarkably, one of the more recent pronouncements from this Court regarding the territorial component of jurisdiction over Indian tribes is found in *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 907 (1991), where this Court considered sovereign immunity with respect to this same Tribe. The Court cited *Mescalero* as precedent (although distinguished it in its ruling) and quoted from the above-cited comments. In particular, this Court noted that *Mescalero* involved activity outside of the reservation. By contrast, the activity at stake in *Oklahoma Tax Commission v. Potawatomi* was on land held in trust and validly set apart by the Federal Government. This Court declined to draw a distinction between reservation and tribal trust land. *Id.* at 498 U.S. 511, 111 S.Ct. 905, 910.

The Supreme Court of New Mexico reached a conclusion consistent with the Oklahoma Supreme Court in *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). There the court found that the state court may exercise jurisdiction over an Indian tribe when the tribe is engaged in commercial activity off of the reservation and is sued for breach of contract in connection with such off-reservation activity. *Id.* at 851.

---

[8] Petitioner omits any reference to or discussion of *Graham*.

Petitioner incorrectly represents that New Mexico later "modified its holding." Petitioner's citation is to *DeFeo v. Ski Apache Resort*, 904 P.2d 1065 (N.M.App. 1995), *cert. denied*, 903 P.2d 844 (N.M. 1995). In addition to being an inferior court of New Mexico, the Court of Appeals of New Mexico in *DeFeo* specifically *did not modify* the holding in *Padilla*.

The court in *DeFeo* noted that critical to the ruling in *Padilla* was the fact that the cause of action arose from off-reservation activities. In *DeFeo* the activities (the accident and injury) occurred on the reservation. The court in *DeFeo* specifically stated its ruling was consistent with *Padilla*. *DeFeo* at 1068.

The New Mexico Court of Appeals in *DeFeo* cited *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 57 (1995), only for the proposition that engagement in commercial activity in general does not strip the Tribe of its defense of sovereign immunity.

More recently, the Washington Court of Appeals followed Oklahoma and Arizona in holding that state courts have jurisdiction over breach of contract actions involving Indian tribes arising off of the Indian reservation. *Maxa v. Yakima Petroleum, Inc.*, 924 P.2d 372 (Wash.App.Div.3 1996).

In *Hoover v. Kiowa Tribe of Oklahoma*, 990 P.2d 59, (Okla. 1995), *cert. denied*, 116 U.S. 1675 (1996), the Oklahoma Supreme Court specifically relied upon *Mescalero*, *Graham* and *Organized Village of Kake* in holding that a contract between an Indian tribe and a non-Indian is enforceable in state court where the contract is executed outside of Indian country.

It is upon this clear line of authority, grounded in this Court's specific discussion of the territorial component of sovereign immunity, that the Oklahoma Supreme Court affirmed the ruling of the District Court of Oklahoma County herein. Therefore, far from being out of step with Federal precedent, the State Court rulings in the case at bar are entirely within the authority prescribed by this Court and the writ should be denied.

Proposition 2: The ruling of the District Court of Oklahoma County as affirmed by the Oklahoma Court of Appeals was otherwise proper based upon the explicit waiver of sovereign immunity by execution of the arbitration agreement and such ruling is consistent with the decisions of other United States Courts of Appeals interpreting similar arbitration clauses.

Assuming, for argument only, that the Petitioner's contract with Respondent could otherwise be frustrated by sovereign immunity, Petitioner clearly and unequivocally waived suit immunity and immunity from arbitration as was necessarily determined by the District Court of Oklahoma County in denying Petitioner's Motion to Dismiss and in granting Respondent Judgment upon its Motion to Confirm Arbitration Award.

Among the courts which have specifically considered arbitration agreements such as the agreement between Petitioner and Respondent in the context of claims of sovereign immunity, the outcomes have been consistent. In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756

(Alaska 1983), interpreting the effect of an arbitration clause, with terms virtually identical to the clause at issue herein, the Alaska Supreme Court stated:

> . . . we believe it is clear that any dispute arising from a contract cannot be resolved by arbitration, as specified in the contract, if one of the parties intends to assert the defense of sovereign immunity. To the extent possible, all provisions in a contract should be found meaningful. . . . The arbitration clause in Eyak's contract with GC Contractors would be meaningless if it did not constitute a waiver of whatever immunity Eyak possessed.

Id. at 760.

In ruling that the arbitration agreement constituted a waiver of suit immunity, the Alaska Court considered *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981). There, the court held that an Indian tribe's agreement to submit all disputes which could not be resolved by negotiation to the Oregon Federal District Court, constituted an express waiver of sovereign suit immunity. *Id.* at 1016.

In *Val/Del, Inc., v. Superior Court*, 703 P.2d 502 (Ariz.App. 1985), *cert. denied*, 474 U.S. 920, 106 S.Ct. 250 (1985), the Pascua Yaqui Tribe entered into an agreement with Val/Del, Inc., to manage the tribe's bingo operation. The court first determined that the Tribe was generally entitled to sovereign immunity. Likewise, as urged by Petitioner, the court acknowledged that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Id.* at 508.

On this foundation, the court considered an arbitration clause contained in the contract between the parties.

Again, the substantive provisions of the clause considered are virtually identical to the provisions of the clause at issue herein. The *Val/Del* court cited with approval both *Native Village of Eyak v. GC Contractors* and *United States v. Oregon* discussed above. The court further stated that:

> Before entering into the arbitration agreement, the respondent tribe was free from suit by Plaintiff. However, **after agreeing that any dispute would be arbitrated and the result entered as a judgment in a court of competent jurisdiction, we find that there was an express waiver of the tribe's sovereign immunity . . . Having expressly waived its sovereign immunity, civil jurisdiction would properly lie with the State of Arizona . . .**

Val/Del, at 509. (emphasis added).

In both *Val/Del* and *Native Village of Eyak v. GC Contractors* state supreme courts have considered virtually identical arbitration clauses in contracts with Indian tribes otherwise possessing sovereign immunity. Certainly, the clauses in these cases were no more explicit or unequivocal in their waiver than the clause in Petitioner's contract. In both cases, the courts found the arbitration agreements to be the very "clear" "unequivocal" and "express" waiver of immunity which Petitioner so ardently argues is required.

Despite Petitioner's strained effort below to characterize the present arbitration clause as a waiver of suit immunity "by inference" only, the clause could not be more explicit. Indeed, no inference is required from the provisions of the clause that "**judgment may be entered**

upon" the arbitration award and that the arbitration agreement "**shall be specifically enforceable under applicable law in any court having jurisdiction thereof.**" The arbitration clause is clearly an express waiver of immunity by Petitioner as was correctly determined by the Oklahoma County District Court.

More recently, in *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1995), the Eighth Circuit Court of Appeals found a clear waiver of sovereign immunity from an arbitration clause which simply stated that all disputes would be decided by arbitration under the Construction Industry Rules of the American Arbitration Association.

Unlike the agreement in the case at bar, the *Rosebud* agreement did not contain specific language stating that judgment may be entered upon any award rendered. Rather, the court looked to Rule 47(c) of the AAA Construction Industry Rules (also applicable to the case at bar) which provides:

> Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

Id. at 562.

Responding to protests of the tribe that the agreement only implied a waiver, the Court of Appeals stated there was no authority requiring the "invocation of 'magic words' stating that the tribe hereby waives its sovereign immunity." The court found an explicit waiver of sovereign immunity. *Id.* at 563.

The same result was reached in *Sokaogon Gaming Enterprise v. Tushie-Montgomery Association*, 86 F.3d 656 (7th Cir. 1996). There, the tribe sued to invalidate an architectural services contract for lack of approval by the Bureau of Indian Affairs and the architects proceeded to arbitration upon the contract for recovery of its services rendered.

The arbitration went forward without the tribe's participation resulting in an award in favor of the architects. An action to confirm the arbitration award was stayed while the court considered whether sovereign immunity had been waived. The Seventh Circuit noted:

> If the tribe waived its sovereign immunity from suit, it may well be bound by the arbitration, which implicitly but unmistakably, by awarding TMI contract damages, determined that the contract was enforceable. If so, and if TMI wins this appeal, the case will be over without the district court's having to try the issue of the contract's validity.

Id. at 659.

The arbitration agreement at issue contained language virtually identical to the agreement between Petitioner and Respondent agreeing to submit all disputes to arbitration and providing that:

> . . . judgment may be entered upon [the arbitration award] in accordance with applicable law in any court having jurisdiction thereof.

Id.

The Court, citing *Prima Paint Corporation v. Flood & Conklin Mfg.*, 388 U.S. 395, 87 S.Ct. 1801 (1967), further stated:

> Although the arbitration clause is contained in a contract that the tribe contends is illegal, the tribe rightly does not argue that the illegality of the contract infects the arbitration clause.

Sokaogon at 659.[9]

The court then considered whether the arbitration agreement was a clear waiver of sovereign immunity. Finding it to be a clear waiver, the court stated:

> The arbitration clause could not be much clearer . . . No one reading this clause could doubt that the effect was to make the tribe suable. The waiver is at least as perspicuous as the statement – perhaps the only statement – that would satisfy the tribe's current lawyer as constituting an explicit waiver of sovereign immunity: 'The tribe will not assert the defense of sovereign immunity if sued for breach of contract.' The term 'sovereign immunity' is a technical legal term, and anyone who knows what it means can

---

[9] In *Prima Paint* this Court held that a federal court considering an application for stay while the parties arbitrate may consider only issues going to the making of the arbitration agreement. Claims of fraud or other defenses to the contract in general are properly to be determined by the arbitration proceedings. *Id.* at 388 U.S. 403, 404, 87 S.Ct. 1806.

> also understand the arbitration clause. The waiver in this case is implicit rather than explicit only if a waiver of sovereign immunity, to be deemed explicit, must use the words 'sovereign immunity.' No case has ever held that.

Id. at 660.

In addition, the arbitration agreement itself confers jurisdiction upon the Oklahoma state courts:

> The making of an agreement described in this section providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under this act and to enter judgment on an award thereunder.

15 O.S. 1978 § 802.B.

Proposition 3: The contract at issue did not require approval under 25 U.S.C. § 81 (1958) as was necessarily determined by the arbitrator and Petitioner did not timely and properly raise this issue in the proceeding before the District Court of Oklahoma County.

Title 25 U.S.C. § 81 (1958), is not applicable to the contract and dispute at issue as the contract is not "relative to their [Indian] lands" as set forth in § 81 because (1) The construction was not on **reservation** or **trust** land; (2) Respondent did not acquire the exclusive right to manage or operate the facility; (3) The Petitioner was not forbidden to encumber the property; and (4) The operation of the facility, a bank, did not depend on the legal status of the Tribe being a sovereign entity. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th

Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993).

Petitioner cites *Narrangansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp 48 (D.R.I 1988) as "federal jurisprudence" that 25 U.S.C. § 81 pertains to all land owned by Indians regardless of how or when acquired. The single decision from the District Court of Rhode Island simply does not live up to such a characterization.

The court in *Narrangansett* relied upon *Alonzo v. United States*, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429 (1958), finding that 25 U.S.C. § 177 applied to lands acquired by tribes through purchase. In reaching for such authority *Narrangansett* assumed incorrectly that the two statutes had a similar purpose of "providing a mechanism to regulate Indian land transactions." *Id.* at 51.

In fact the two statutes have obviously different purposes. Discussing the history of 25 U.S.C. § 177, the Tenth Circuit Court of Appeals in *Alonzo* – restating the very "unsolicited paternalism" which Petitioner decries – states:

> The purpose of restrictions is to protect the Indians, 'a simple, uninformed people, ill-prepared to cope with the intelligence and greed of other races' against the loss of their lands by improvident disposition or through overreaching by members of other races.

Alonzo at 196.

By contrast, the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands:

> This delineation of section 81's scope suggests that Congress was concerned about contracts for the representation of Indians' interests . . . legislative history of section 81 shows that 'contractual relations with attorneys and claims agents were foremost on Congress' mind . . . '
>
> . . .
>
> . . . Congress was concerned specifically about contracts for services such as representation of Indian interests before Congress and the pressing of Indians' claims.

See In Re U.S. Ex Rel. Hall, 825 F.Supp. 1422, 1431, 1432 (D.Minn. 1993).

In light of the obviously differing purposes of § 81 and § 177, *Narrangansett*'s reliance upon *Alonzo* is at a minimum suspect. Moreover, it is entirely reasonable that even if 25 U.S.C. § 177 restricts conveyances of any lands from Indian tribes, 25 U.S.C. § 81 should and is nonetheless limited to services relative to reservation or trust lands.

Obviously, in any conveyance of land from an Indian tribe it will be known – at the latest upon inspection of the record title to the land – that the land is held by an Indian tribe and that therefore transfer is restricted. On the other hand, since Indian tribes may and often do own land removed from the reservation or trust territory, and since the tribe's ownership of a business on such land may be neither obvious nor expected due to the use of trade names or leases to third parties, it would indeed be an unjust trap for any service provider if Indian tribes could avoid such contracts. In other words, if Petitioner purchased a convenience store, removed from trust or

reservation land, and contracted with a third party to operate it, suppliers, mechanics, lawn care providers and others would likely contract with the third party without knowledge that the real estate was owned by Indians thereby allowing breach of the contracts with impunity.

Although most authorities setting forth the factors determining when a service contract is relative to Indian lands are relating to management contracts, such analysis has been given broader application. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993) (analysis applied to a manufacturing plant).

Moreover, cases applying § 81 overwhelmingly do so only upon the finding, *inter alia*, that the land involved was "trust" or "reservation" land. *See Mission Indians v. American Management & Amusement*, 840 F.2d 1394 (9th Cir. 1988), *cert. dismissed*, 487 U.S. 1247, 109 S.Ct. 7 (1988); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 621 (1993); *Native Village of Eyak v. GC Contractors*, 658 P.2d 756, 760 (Alaska 1983); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985).

Finally, in reference to the claim of 25 U.S.C. § 81 application, Respondent specifically alleged below (both in the arbitration proceedings, in its Petition and briefing to the Oklahoma County District Court and in briefing to the Oklahoma Court of Appeals) that some or all of the funds used for construction of the bank and its roof were non-tribe funds such as Economic Development Grant or other government grant funds. At no time has Petitioner

denied this and therefore the allegation has been admitted and determined in the proceedings below. Therefore, § 81 is not applicable regardless of whether the contract was relative to Indian lands. *Sac and Fox Tribe of Indians of Oklahoma v. Apex Construction Co., Inc.*, 757 F.2d 221 (10th Cir. 1985).

CONCLUSION

This Court should deny the writ of *certiorari* for the reasons cited above consistent with this Court's previous rulings upon these issues.

Respectfully submitted,

JOHN D. MASHBURN
Counsel of Record
JAMES W. CARLTON JR.
GARVIN, AGEE, CARLTON
& MASHBURN
2100 City Place
204 North Robinson
Oklahoma City, OK 73102
(405) 232-9996 FAX (405) 232-4061

Supreme Court, U.S.
FILED
JUN 6 1997
OFFICE OF THE CLERK

No. 96-1721

In The

Supreme Court of the United States

October Term, 1996

CITIZEN POTAWATOMI NATION,

Petitioner,

vs.

C & L ENTERPRISES, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

PETITIONER'S REPLY BRIEF

MICHAEL MINNIS, OBA #6521
Counsel of Record
DAVID MCCULLOUGH, OBA #10898
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N Broadway Ave Ste 3160
Oklahoma City OK 73102-8805
(405) 235-7686 FAX (405) 232-5460

Attorneys for Petitioner
Citizen Potawatomi Nation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

16 PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

Reply to C&L Proposition No. 1 2

Reply to C&L Proposition No. 2 4

Reply to C&L Proposition No. 3 8

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma, No. 86,184, WL 222406, at *6, ¶ 3 (Okla. May 6, 1997) 3

Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958) 10

Altheimer & Gray v. Sioux Mfg. Corp., 983 F.2d 803 (7th Cir. 1993) 9

Bank of Oklahoma v. Muskogee (Creek) Nation, 972 F.2d 1166 (10th Cir. 1992) 11

In re U.S. ex rel Hall, 825 F.Supp. 1422 (D.Minn. 1993) 9

Hoover v. Kiowa Tribe of Okla., 909 P.2d 59 (Okla. 1995) 1, 3

Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) ... 2, 3

Mission Indians v. American Management Amusement, 840 F.2d 1394 (9th Cir. 1988) 9

Narragansett Indian Tribe v. Ribo, Inc., 686 F.Supp. 48 (D.R.I. 1988) 10

Native Village of Eyak v. GC Contractors, 658 P.2d 756 (Alaska 1983) 5

Oklahoma Tax Commission v. Potawatomi Indian Tribe, 498 U.S. 505 (1991) 3

Organized Villiage of Kake v. Egan, 369 U.S. 60 (1992) 1, 2

Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416 (9th Cir. 1989) 6

TABLE OF AUTHORITIES – Continued

Page

Rosebud Sioux Tribe v. Val-U Construction, 50 F.3d 560 (8th Cir. 1995) 6

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 7

Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc., 86 F.3d 656 (7th Cir. 1996) 6

Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986) 5

United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981) 6

United States v. Testan, 424 U.S. 392 (1976) 7

United States v. King, 395 U.S. 1 (1969) 7

Val/Del, Inc. v. Superior Court, 703 P.2d 502 (Ariz. App. 1985) 5

FEDERAL STATUTES AND RULES:

15 U.S.C. § 1632 8

25 U.S.C. § 81 ..... 1, 8, 9, 10

14A O.S. 1991, § 2-302 8

OTHER:

Indian Non-intercourse Act, 25 U.S.C.A. § 177 10

PETITIONER'S REPLY BRIEF

C&L Enterprises, Inc., ("C&L"), Respondent, having filed a brief in opposition to the petition for writ of certiorari and having raised therein points not contained in the petition, the Citizen Potawatomi Nation ("Potawatomi"), Petitioner, submits the following reply.

ARGUMENT

The Potawatomi petition seeks review of the holding by the Oklahoma Supreme Court that a "contract between an Indian tribe and a non-Indian is enforceable in state court when the contract is executed outside of Indian Country."[1] In responding, C&L has completely ignored the only issue (tribal suit immunity) and the relevant case law. In opposing the petition for certiorari, C&L makes three arguments: (1) that the Oklahoma Supreme Court in rejecting tribal suit immunity was acting consistent with *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); (2) that the Oklahoma Supreme Court had an alternative basis for finding jurisdiction over an Indian tribe,[2] to-wit: an arbitration clause in the contract; and (3) the Potawatomi did not timely and properly raise the applicability of 25 U.S.C. § 81. None of these issues was

---

[1] *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 62 (Okla. 1995).

[2] Although C&L consistently argued that the arbitration clause was a jurisdictional waiver, no forum (the arbitrator, the district court, or the Court of Appeals) ruled that the arbitration clause was a waiver of tribal suit immunity.

briefed by the Potawatomi.[3] As explained hereafter, the three new issues raised by C&L do not diminish in any material respect the reasons originally proffered by the Potawatomi in favor of granting certiorari.

Reply to C&L Proposition No. 1

The language quoted by C&L from *Organized Village of Kake*[4] arose in a context considerably different from that at issue here. *Organized Village of Kake* and the other case cited by C&L[5] were suits *initiated* by Indian tribes against states where the tribes were acting within the states' territorial jurisdictions, but resisting compliance with state statutes.[6] Neither *Organized Village of Kake* nor *Mescalero Apache Tribe* held that Indian tribes waive sovereign immunity from suit. The limitation on tribal sovereignty recognized by these cases is that when Indian

---

[3] The Potawatomi did discuss the applicability of Section 81, [*See* Pet. at 18, 20-21], noted where the issue had been raised [Pet. at 6, n.6], but did not directly discuss whether the issue was timely or properly raised.

[4] "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation." *Organized Village of Kake*, 369 U.S. at 75.

[5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

[6] In *Organized Village of Kake*, a tribe sued Alaska (where Indian jurisprudence is unique in any event) to enjoin enforcement of state fishing regulations against tribal members. *Organized Village of Kake*, 369 U.S. at 61. The relief was denied. In *Mescalero Apache*, an Indian tribe sued a state for certain taxes assessed in relation to a ski resort operated by the tribe off the reservation. *Mescalero Apache*, 411 U.S. at 146. The imposition of state income and gross receipts taxes was upheld, but a state use tax was enjoined.

tribes operate within state jurisdictional areas they are "subject to nondiscriminatory state law" unless exempted by federal statutory law. *Mescalero Apache Tribe*, 411 U.S. at 148-49. These cases do not hold that Indian tribes can be sued in state courts by a third party without an explicit waiver of suit immunity. In fact, another case cited by C&L involved the Potawatomi[7] and described the distinctions ignored by C&L. In *Potawatomi*, this Court held that the State of Oklahoma's statutory requirement to collect cigarette taxes applies to the Potawatomi when selling to non-tribal members,[8] but that "[t]here is no doubt that sovereign immunity bars" Oklahoma from bringing suit against the Potawatomi for failure to collect the taxes.[9] Discussing *Hoover* and *Oklahoma Tax Commission v. Potawatomi*, an Oklahoma Justice recently remarked:

> It is strange, to say the least, that this Court gives Aircraft Equipment Co., as a judgment creditor, a remedy against an Indian tribe which the United States Supreme Court says the State of Oklahoma, as a judgment creditor, would not have and could not use against an Indian tribe.

Aircraft Equipment Co. v. Kiowa Tribe of Oklahoma, No. 86,184, 1997 WL 222406, at *6, ¶ 3 (Okla. May 6, 1997) (Summers, V.C.J., dissenting, with whom Kauger, C.J., joins).

---

[7] *Oklahoma Tax Commission v. Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

[8] *Id.* at 512.

[9] *Id.* at 514.

The other authorities cited by C&L in support of its first proposition are not federal decisions but rather state decisions where state courts other than Oklahoma have sought to impose their will on Indian commerce regardless of federal law. None are germane to this petition.

The cases cited by the Potawatomi in the petition to which C&L has not responded are consistent with 200 years of history, to-wit: state courts do not have jurisdiction over Indian tribes absent a clear and unequivocal waiver of sovereign suit immunity.

Reply to C&L Proposition No. 2

C&L's second proposition is an attempt to bootstrap an arbitration clause into a waiver of sovereign immunity clause. This argument would strip the words "clear" and "unequivocal" of any meaning and is contrary to holdings by this Court that a waiver cannot be inferred. At a minimum, a clear and unequivocal waiver of sovereign suit immunity would include the words "waiver" and "suit immunity" and be in a clause labeled "waiver," not in a clause labeled "Administration of the Contract."[10]

---

[10] Arbitration is discussed in paragraph 10.8. [App. 36] of article 10 ("Administration of the Contract"). App. 36. C&L admits that the agreement at issue here is a form contract copyrighted by the American Institute of Architects ("AIA") in 1987, but then implies that the critical terms in the contract (the arbitration paragraph) were drafted by the Potawatomi. This is not accurate. The arbitration paragraph, one of many paragraphs in one of 20 articles, is part of the standard form contract copyrighted by the AIA. Under C&L's construction of this form contract that was not tailored in any way for an Indian tribe, the arbitration paragraph compels arbitration of disputes

C&L states that the Potawatomi had no immunity because the contract "was – without dispute – executed outside of Indian country." Resp't Br. at 4. This assertion is not accurate nor supported by the record. No party ever performed under C&L's putative contract. *No* activity ever occurred. The record does not reflect where any of the signatories were located at the time that they affixed their names to the document. In any event, the place of the signing of the document is immaterial. What is important is whether or not those putatively signing for the tribe had been empowered by the tribe to waive sovereign immunity and whether they exercised that power in clear and unequivocal terms. An arbitration paragraph cannot be construed as a waiver of sovereign Indian immunity without doing violence to the holdings of the United States Supreme Court. Subjecting a sovereign entity to suit without its consent necessarily interferes with the sovereign's ability to manage its own affairs and maintain control over its public funds, territories, and peoples. As the Supreme Court has observed, a tribes's immunity from suit "is a necessary corollary to Indian sovereignty and self-governance. * * * tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986).

Again, as authority for this argument, C&L principally relies on state cases[11] that misconstrued a Ninth

---

when signed by a non-Indian, but compels arbitration of disputes *and* waives tribal suit immunity when signed by an Indian tribe.

[11] Alaska [*Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983)] and Arizona [*Val/Del, Inc. v. Superior Court*,

Circuit case to reach a result that, as the Ninth Circuit subsequently held, is inconsistent with federal law. The Ninth Circuit decision[12] held that an Indian tribe waives suit immunity "by intervening as a party plaintiff and subsequently entering into a fishing conservation agreement which provided, among other things, that the parties to the agreement would submit all future disputes to the Oregon district court for resolution."[13] The Ninth Circuit later recognized that state courts (Alaska and Arizona)[14] had misconstrued their pronouncement on arbitration clauses and reiterated that waivers of suit immunity cannot be implied but must be clear and unequivocal. A finding that an arbitration clause is a waiver of tribal sovereignty "runs counter to not only the strong presumption against tribal waivers of immunity, but also generally accepted principles governing the interpretation of contractual arbitration provisions." *Id.* at 419. Because of the "strong presumption against waivers of tribal sovereign immunity," the Ninth Circuit refused

---

703 P.2d 502 (Ariz. App. 1985)]. C&L also cites two federal cases: *Rosebud Sioux Tribe v. Val-U Construction*, 50 F.3d 560 (8th Cir. 1995) and *Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Associates, Inc.*, 86 F.3d 656 (7th Cir. 1996). The *Rosebud* panel relied on *Native Village of Eyak* without mentioning the Ninth Circuit decisions. *Rosebud*, 50 F.3d at 562. The *Sokaogon* panel simply rejected the Supreme Court requirement for an explicit waiver. *Sokaogon*, 86 F.3d at 659-60 ("[We] doubt whether there really is a requirement that a tribe's waiver of its sovereign immunity be explicit.").

[12] *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981).

[13] *Pan American Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 419 (9th Cir. 1989).

[14] *Id.* at 419-20.

"to imply a waiver of sovereign immunity * * * by entering into * * * [an] arbitration clause." *Id.* at 420. Nothing remotely similar occurred here. The Potawatomi have consistently and unmistakenly asserted their sovereign immunity to the arbitrator, to the state district court, and to the state appellate courts. They have never intervened in any litigation.

In any event, these state cases cannot overrule United States Supreme Court decisions holding that "[i]t is settled that a waiver of sovereign immunity ' "cannot be implied but must be unequivocally expressed." ' *United States v. Testan*, 424 U.S. 392, 399, 47 L.Ed.2d 114, 96 S.Ct. 948 (1976), quoting, *United States v. King*, 395 U.S. 1, 4, 23 L.Ed.2d 52, 89 S.Ct. 1501 (1969)." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

C&L argues that a form arbitration clause – that does not mention tribal sovereign immunity nor "waiver" – is the clear and unequivocal waiver of sovereign immunity required by the United States Supreme Court. If so, the words "clear" and "unequivocal" cease to have any meaning. An "arbitration clause" is an "arbitration clause," not a "*waiver* clause." No waiver of suit immunity is expressed in the arbitration paragraph. Thus, any argument of waiver must arise by an inference from the arbitration paragraph. Inferring waiver of tribal sovereignty has clearly been rejected by the United States Supreme Court. The phrase "unequivocally expressed" can have no meaning if a standard form arbitration clause that neither mentions Indian tribes, suit immunity, or waiver is considered to be an "unequivocally expressed" waiver of tribal suit immunity.

Reply to C&L Proposition No. 3

Assuming *arguendo* its validity, the arbitration-is-waiver argument is trumped by the fact that the contract itself and every term in it (including the arbitration paragraph) is "null and void" because not approved as required by 25 U.S.C. § 81. To avoid the consequences of § 81, C&L makes a series of arguments addressed hereafter *seriatim*.

First, C&L implies that arbitration clauses survive even an invalid contract. Resp't Br. at 17 citing *Sokaogon* at 659. Thus, C&L is arguing that an arbitration paragraph in a contract not only compels arbitration and, when signed by an Indian tribe, waives tribal suit immunity, it has a life of its own independent of the contract itself! If the contract is void, what is arbitrated? These super-contractual attributes claimed for a simple arbitration paragraph offend common sense, are not consistent with contract law nor with the typographical emphasis usually accorded waivers of rights in a contract.[15]

Second, C&L states that:

> Petitioner did not timely and properly raise the federal issue of the applicability of 25 U.S.C. § 81 (1958) before the District Court. Rather, Petitioner relegated same to a single footnote which alleges application of the statute in a purely conclusive manner without any mention

---

[15] Here the arbitration paragraph was indistinguishable from other paragraphs in the form agreement. Many jurisdictions require that significant terms in a contract be more conspicuously displayed than other terms. *See e.g.* 15 U.S.C. § 1632; 14A O.S.1991, § 2-302, ¶ (2). *Compare* App. 22.

> of its essential elements or any factual basis for the District Court to determine its application.

Resp't Br. at 4. This statement ignores C&L's own petition which includes allegations that the alleged contract was to construct a roof on a building and on land owned by an Indian tribe. *See* App. 18-19, ¶¶ 1, 4. C&L's own allegations provided the "factual basis for the District Court to determine" the application of § 81. C&L claims that the § 81 issue was not timely asserted even though the Potawatomi advised the arbitrator[16] of § 81 and, as C&L notes, the Potawatomi raised the issue in the first pleading they filed in the State District Court. *See* Pet. at. 6, n.6.

Third, C&L argues that Section 81 does not apply because four factors discussed in a Ninth Circuit case are not present.[17] These four factors and the cases cited have no application to the circumstances here. These factors were discussed in "determining whether a management contract [with an Indian tribe] is relative to Indian lands."[18] A contract to construct a roof on a building affixed to Indian lands is not a management contract but is clearly "relative to their lands."

Fourth, C&L argues that the Section 81 phrase "their lands" refers only to "reservation or trust land." This

---

[16] *See* Pet. at 5.

[17] Resp't Br. at 18-19. "*See Mission Indians v. American Management Amusement*, 840 F.2d 1394 (9th Cir. 1988) * * * ; *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803 (7th Cir. 1993)."

[18] *In re U.S. ex rel Hall*, 825 F.Supp. 1422, 1433 (D.Minn. 1993).

argument is succinctly rejected in *Narragansett Indian Tribe v. Ribo, Inc.*, 686 F.Supp. 48, 51 (D.R.I. 1988):

> Defendants contend that 25 U.S.C. § 81 pertains only to "tribal land" which they define as being limited to land that is part of the tribe's reservation. However, they have cited no authority in support of that interpretation. Moreover, such a construction appears to be at variance with both the plain language of the statute and with its broad remedial purpose. Thus, the statute uses the term "their [the Indians'] lands" without differentiating between original tribal lands and those subsequently acquired. Reading into those words the limitation urged by Defendants would distort their plain meaning. Moreover, it also would emasculate the statute and frustrate its purpose by providing a mechanism to regulate Indian land transactions. Indeed, it has been said that the Indian Non-intercourse Act, 25 U.S.C.A. § 177, a statute having a similar objective, applies to lands acquired by tribes through purchase as well as through other means. *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied*, 355 U.S. 940, 78 S.Ct. 429, 2 L.Ed.2d 421 (1958).

Fifth, C&L states that "the purpose underlying 25 U.S.C. § 81 is not related to disposition of Indian lands." Resp't Br. at 19. This is patent nonsense. Section 81 makes any contract with an Indian tribe "relative to their lands" null and void unless properly endorsed by the Secretary of the Interior. The *primary purpose* of § 81 *is* to protect the lands of Indians and Indian tribes.

Finally, C&L states that it consistently alleged "that some or all of the funds used for construction of the bank and its roof were non-tribal funds * * * . At no time has Petitioner denied this and therefore this allegation has been admitted and determined in the proceeding below." Resp't Br. at 21-22. This assertion is not true. C&L made this allegation in its petition. The Potawatomi never answered the petition because of the jurisdictional challenge. When C&L raised this issue in briefs filed in related proceedings, the Potawatomi responded that the assertion was irrelevant and not accurate.[19] C&L has never offered any evidence in support of this allegation which is irrelevant and not true in any event.

The basis for the state court's exercise of jurisdiction over the Potawatomi in the C&L case is not the arbitration paragraph nor the alleged funding of the project, but rather the *Hoover* decision that Indian tribes waive sovereign immunity by engaging in commercial activity outside of Indian country. In any event, the arbitration clause cannot effect a waiver because the C&L agreement – including the arbitration clause – is void under *federal* law and the clause is not the clear and unequivocal waiver of tribal suit immunity required by federal law. *Bank of Oklahoma v. Muskogee (Creek) Nation*, 972 F.2d 1166, 1169, 1171 (10th Cir. 1992).

---

[19] *See e.g.* Reply Brief of Appellant at 13, *Citizen Potawatomi Nation v. Freeman*, No. 96-6279 (10th Cir. Dec. 13, 1996).

CONCLUSION

The petition for certiorari should be granted and the District Court judgment for the Respondent should be reversed with directions to dismiss the suit for lack of jurisdiction.

Respectfully submitted,

MICHAEL MINNIS, OBA #6251*
DAVID MCCULLOUGH, OBA #10898
MICHAEL MINNIS & ASSOCIATES, P.C.
100 N Broadway Ave Ste 3160
Oklahoma City OK 73102-8805
(405) 235-7686 Fax (405) 232-5460
Attorneys for Citizen Potawatomi Nation, Petitioner

**Counsel of Record*